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No. 06-___

In the Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner

v.

SAN LUIS OBISPO MOTHERS FOR PEACE, *et al.*,

Respondents

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act ("NEPA") requires a federal agency to consider, as part of its NEPA review of an agency action, the environmental impact of potential sabotage whenever the possibility of sabotage is anything more than "remote and highly speculative," regardless of whether the agency action lacks a close, "proximate-cause" relationship to the potential sabotage and its impacts.

2. Whether an agency is required to consider the risk of sabotage in its NEPA review even if the agency reasonably concludes that the risk is not sufficiently quantifiable to be meaningful or to assist agency decision making under NEPA.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

1. Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The petitioner here and an intervenor-respondent below is Pacific Gas and Electric Company ("PG&E").

The respondents below and respondents here are the Nuclear Regulatory Commission and the United States of America.

The petitioners below and respondents here are San Luis Obispo Mothers for Peace, the Sierra Club (Santa Lucia Chapter), and Peg Pinard.

2. Pursuant to Rule 29.6, petitioner states as follows:

PG&E is a corporation organized under the laws of California, with its principal place of business in San Francisco, California. PG&E is a public utility operating throughout most of northern and central California. PG&E is engaged primarily in the businesses of electricity generation; electricity and natural gas distribution; electricity transmission; and natural gas procurement, transportation, and storage. PG&E serves approximately 4.9 million electricity distribution customers and approximately 4.1 million natural gas distribution customers. PG&E is a subsidiary of PG&E Corporation, an energy-based holding company organized under the laws of the State of California, with its principal executive offices in San Francisco, California. PG&E Corporation is the only publicly held corporation owning ten percent (10%) or more of PG&E's stock.

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INTRODUCTION

In the decision below, the Ninth Circuit has overruled the Nuclear Regulatory Commission ("NRC" or "Commission") on two issues of great importance to the administration of the National Environmental Policy Act ("NEPA")—a statute that all too often is used by opponents of nuclear power to delay and make more costly the construction of all types of nuclear facilities. In so ruling, the Ninth Circuit has spurned controlling decisions of this Court and has placed itself in conflict with decisions in at least three other circuits, even while threatening the NRC's efforts to make more efficient the approval process for all nuclear facilities.

The NRC decision reviewed by the Ninth Circuit concerns a storage installation for spent nuclear fuel at the Diablo Canyon Power Plant ("Diablo Canyon"), a nuclear power plant located in San Luis Obispo County, California and owned and operated by petitioner Pacific Gas and Electric Company ("PG&E"). The private respondent here, San Luis Obispo Mothers for Peace, argued that the agency was required to review and address terrorism risks, not only in its ongoing security review (which for security reasons has only limited public participation), but also as part of the public proceeding that the agency conducts under NEPA. The NRC disagreed, in part because of the security risks posed by a public vetting of terrorism issues.

The first issue on which the Ninth Circuit ruled against the NRC concerns the legal threshold for determining the scope of an agency's NEPA review. The issue was addressed by this Court in *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766 (1983), and then again in *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004). Those decisions unanimously held that whether a possible environmental effect must be assessed depends upon whether there exists "'a *reasonably close* causal relationship' between the environmental effect and the

alleged cause." *Pub. Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774) (emphasis added). Both decisions made clear that this standard is similar "to the 'familiar doctrine of proximate cause from tort law'" (*ibid.*), and that the Court intended it to set "'a manageable line between those causal changes that may make an actor [*i.e.*, an agency] responsible for an effect and those that do not.'" *Ibid.* (quoting *Metropolitan Edison*, 460 U.S. at 774 & n. 7). Here, the NRC relied upon this standard in holding that it was not required to address a potential terrorist attack in its NEPA analysis in addition to its ongoing security review.

The Ninth Circuit, however, held that the NRC erred in applying the *Metropolitan Edison* standard rather than the stricter standard applied by the Ninth Circuit in *No GWEN Alliance* v. *Aldridge*, 855 F.2d 1380 (9th Cir. 1988). Pet. App. 19a-21a. As a result of its analysis of these decisions, the Ninth Circuit held that an agency must conduct a NEPA analysis of any possible environmental effect—including effects that could result from intervening criminal conduct by third parties—*unless* the court can be convinced that the cause and effect are "remote and highly speculative." *Id.* at 21a. In so holding, the Ninth Circuit placed itself in conflict with decisions of the D.C. and Second Circuits, both of which have applied the *Metropolitan Edison* standard in determining that the causal relationship between agency decisions and potential acts of sabotage was *not* sufficiently close to warrant inclusion in a NEPA analysis.

The Ninth Circuit also rejected the NRC's independent conclusion that "the likelihood of [a criminal] attack cannot be ascertained with confidence by any state-of-the-art methodology" and, therefore, that the NRC had "no means to assess, usefully, the risks of terrorism" in any way that would be helpful to its NEPA analysis. Pet. App. 56a. The Ninth Circuit held that an agency's inability to quantify the risk of sabotage does not allow the agency "to eliminate a possible environmental consequence from analysis" (*id.* at

25a) and that, even if it did, the *NRC* "has not established that the risk of a terrorist attack is unquantifiable." *Id.* at 26a. The only authority the Ninth Circuit cited for this proposition was the *dissent* in *Limerick Ecology Action, Inc.* v. *NRC*, 869 F.2d 719, 754 (3rd Cir. 1989). *Id.* at 25a. Not surprisingly, the Ninth Circuit's decision conflicts with the majority opinion in that case. And the Ninth Circuit's decision improperly shifts the burden of proof on the quantifiability issue from the petitioner to the agency.

Given the conflicts that the decision below creates with decisions of sister circuits and of this Court, and given the immense practical importance of the issue to PG&E, to the entire nuclear industry, and indeed to all industries regulated by federal agencies subject to NEPA, the decision below merits this Court's review.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-31a) is reported at 449 F.3d 1016. The order of the Nuclear Regulatory Commission reviewed by the court of appeals (Pet. App. 32a-41a) and a related Commission opinion (Pet. App. 42a-67a) are reported at 57 N.R.C. 1 and 56 N.R.C. 340.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2006. Pet. App. 1a. No party to the proceeding filed a petition for panel rehearing or rehearing *en banc*. By order dated August 28, 2006, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including September 29, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4437, Council on Environmental Quality regulations, 40 C.F.R. §§ 1500.1-

1518.4, and Nuclear Regulatory Commission regulations, 10 C.F.R. §§ 51.1-.125 are reprinted at Pet. App. 75a-85a.

STATEMENT OF THE CASE

A proper understanding of the issues presented and why they merit this Court's review requires some familiarity with: (a) NEPA and its purposes; (b) the administrative proceedings before the NRC; and (c) the Ninth Circuit's decision.

A. NEPA And Its Purposes

Congress enacted NEPA to ensure that agencies consider the environmental consequences of proposed major federal actions. 42 U.S.C. § 4321; 40 C.F.R. § 1500.1(c). NEPA is a procedural statute; it does not mandate particular substantive results. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227-228 (1980) (per curiam). It requires an agency to prepare a detailed environmental impact statement ("EIS") only if a proposal is a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

Regulations promulgated by the NRC and by the Council on Environmental Quality ("CEQ"), moreover, provide that an agency may prepare an environmental assessment ("EA") to determine whether a proposed action is likely to have a significant impact on the environment. See 10 C.F.R. §§ 51.25, 51.30-.31; 40 C.F.R. §§ 1501.3, 1501.4. If the agency determines through an EA that the proposed action will not have a significant effect on the quality of the human environment, the agency issues a "finding of no significant impact," and it does not need to prepare an EIS. See 10 C.F.R. §§ 51.30-.35; 40 C.F.R. §§ 1501.4(e), 1508.13.

B. Administrative Proceedings

On December 21, 2001, PG&E filed an application with the NRC for a license that would authorize PG&E to place

spent fuel and related radioactive materials from the Diablo Canyon power plant into "dry" storage in a separately-licensed, independent spent fuel storage installation ("ISFSI") at the Diablo Canyon site. The ISFSI is intended to provide interim storage of spent fuel in accordance with Congress' direction in the Nuclear Waste Policy Act of 1982, as amended ("NWPA"). See 42 U.S.C. § 10151(a)(1).[1]

On April 22, 2002, the NRC published in the *Federal Register* a notice of opportunity for a hearing on the PG&E application. 67 Fed. Reg. 19,600 (Apr. 22, 2002). Respondent San Luis Obispo Mothers for Peace and several others (collectively "Mothers for Peace") jointly submitted a petition to intervene and a request for a hearing. On July 18, 2002, these parties filed an amended petition setting forth proposed contentions for hearing. Pet App. 68a-74a. Among other things, they argued that PG&E's Environmental Report ("ER") was inadequate because it did not include an assessment of the environmental consequences of deliberate acts of sabotage. *Ibid.*

On December 2, 2002, the NRC's Atomic Safety and Licensing Board ("Licensing Board") ruled that, under the Commission's hearing rules, the terrorism-related contentions constituted impermissible challenges to the Commission's security regulations. Pet App. 34a-36a. The Licensing Board also concluded that license applicants are not required to design facilities against destructive acts by "enemies of the United States." *Id.* at 35a. The Licensing

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[1] As at other nuclear power plants, spent fuel at Diablo Canyon is initially (and still) stored in a "wet" spent fuel pool. Dry storage allows spent fuel that has already been cooled for a time in a spent fuel pool to be removed from the pool and stored in a leak-tight steel cylinder bound within a robust concrete cask. An ISFSI is a facility for maintaining a number of storage casks, up to a licensed maximum. ISFSIs must meet NRC safety and security requirements. See, *e.g.*, 10 C.F.R. Part 72, Subpart H.

Board referred its ruling on these contentions to the Commission, inasmuch as identical issues had been raised in several other NRC proceedings and were pending before the Commission at the time. *Id.* at 36a. None of those other proceedings has generated a court decision.

The Commission accepted the Licensing Board's referral of the terrorism issues and, on January 23, 2003, affirmed the result reached by the Licensing Board. Pet App. 32a-41a. (Order CLI-03-1) In fact, in the interim between the Licensing Board's referral and the Commission's decision in this case, the Commission had already considered, in the *Private Fuel Storage* proceeding, the issue of whether NEPA requires evaluation of impacts caused by terrorist acts. Pet. App. 42a-67a. (Order CLI-02-25)

In the decision at issue here, the Commission applied the *Private Fuel Storage* precedent to hold as a matter of law that NEPA does not require a review of the likelihood or environmental impacts of a terrorist attack on the proposed facility. Pet. App. 38a-41a. For one thing, applying the "proximate cause" standard articulated by this court in *Metropolitan Edison,* the NRC held that the possibility of a terrorist attack at any one facility is speculative and too far removed from the natural or expected consequences of the agency's action to require further study under NEPA. *Id.* at 38a-39a, 51a-55a. For another, the NRC concluded that the risk of a terrorist attack at a nuclear facility cannot be adequately quantified or determined, and that the agency thus had "no means to assess, meaningfully, the risks of terrorism" at any particular facility. *Id.* at 39a, 55a-57a. The NRC also emphasized that the public NEPA process is an inappropriate forum for considering sensitive threat assessment issues, and that public NEPA reviews "may well have the perverse effect of assisting terrorists seeking effective means to cause a release of radioactivity." *Id.* at 39a, 62a-65a.

In October 2003 the NRC issued an EA for the proposed action. In that 26-page document, the NRC considered the impacts of the proposed action, including the non-radiological and radiological impacts of ISFSI construction, as well as the potential impacts of operating the facility and decommissioning it at the end of its useful life. The NRC concluded that an EIS was not warranted and issued a finding of no significant impact. Pet. App. 10a. The NRC then issued a license to PG&E on March 22, 2004.

C. The Decision Below

On December 11, 2003, Mothers for Peace filed a petition in the Ninth Circuit seeking review of the NRC's decision. They argued, among other things, that the NRC erroneously declined to hold a hearing on whether the environmental impacts of terrorist attacks and other "acts of malice or insanity" against the ISFSI should be addressed in an EIS.

In its decision, issued June 2, 2006, the court of appeals held that "the NRC's determination that NEPA does not require a consideration of the environmental impact of terrorist attacks does not satisfy a reasonableness review." Pet. App. 31a. In so holding, the court rejected each of the independent reasons the NRC had given in *Private Fuel Storage* for declining to consider the environmental impact of terrorist attacks under NEPA. *Id.* at 17a-30a.

First, declining to apply this Court's *Metropolitan Edison* standard of causation, the court ruled that the exclusive standard for determining whether a potential effect must be considered under NEPA is whether the hypothetical effect in question is something more than "remote and highly speculative." Pet. App. 21a. If it is, the agency must include that effect in its NEPA review. Having thus found that the NRC had erred in applying the "proximate cause" standard articulated by this Court in *Metropolitan Edison*, the court directed the NRC to conduct a new assessment applying the

Ninth Circuit's own "remote and highly speculative" standard instead. *Id.* at 22a-24a, 31a.

Second, the court rejected the NRC's conclusion that it need not conduct a full-scale NEPA analysis of a risk that cannot be quantified in a manner sufficient to permit a meaningful NEPA analysis. Pet. App. 26a. Accordingly, the court held the agency's EA inadequate, and remanded to the agency for further proceedings on that issue. *Id.* at 31a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision countermands the NRC on two issues of great importance to the administration of NEPA: the "causation" standard that must be met before the NRC or any other agency is obligated to include a potential environmental effect as part of its NEPA analysis; and whether a NEPA review is required where the risks associated with that potential effect are not sufficiently quantifiable to allow a meaningful NEPA analysis. As we show below, on the first issue the Ninth Circuit's decision squarely conflicts with decisions of this Court as well as decisions in other circuits. And on the second issue, the decision below conflicts with CEQ regulations that this Court has previously endorsed, as well as a decision of the Third Circuit.

In addition, the decision has widespread adverse consequences. It threatens to impose a substantial burden on PG&E and other private parties participating in future NRC licensing proceedings for existing and new nuclear power plants. It also will impose unnecessary burdens on applicants for permits from other federal agencies subject to the requirements of NEPA and on those agencies. The decision also creates a cloud of uncertainty over PG&E's plans for spent fuel storage at Diablo Canyon, which is the most significant electrical generating facility in California. And finally, as the NRC stressed, NEPA reviews of terrorist threat scenarios would themselves create a risk that

classified information could be released, to the detriment of public health and safety. For all of these reasons, this Court's review is warranted.

I. The Ninth Circuit's Holding Regarding NEPA's "Causation" Standard Conflicts With Decisions Of This Court As Well As Decisions In At Least Two Other Circuits

As this Court recognized in *Metropolitan Edison,* an agency's decision about the proper scope of its NEPA analysis can have a major impact on the burdens that analysis will impose on private applicants and on the agency. See 460 U.S. at 776. On that issue, the decision below is a clear departure from controlling decisions of this Court adopting a NEPA "causation" requirement, and from decisions in other circuits faithfully applying that requirement.

A. The Decision Below Expressly Rejects This Court's Causation Standard, And Does So On Implausible Grounds

In *Metropolitan Edison,* and then again in *Public Citizen,* this Court unanimously held that whether a particular environmental "effect" must be assessed under NEPA depends at the threshold upon whether there exists "'a reasonably close causal relationship' between the environmental effect and the alleged cause" – *i.e.,* the agency action under consideration. *Pub. Citizen,* 541 U.S. at 767 (quoting *Metropolitan Edison,* 460 U.S. at 774). The Court made clear that the standard for determining whether a "reasonably close causal relationship" exists is a "proximate cause" standard akin to that typically applied in tort law. *Id.* As in tort law, where the concept of "proximate cause" is applied to define a point where an initial actor is no longer responsible for a chain of ensuing events, the Court intended to set "'a manageable line between those causal changes that may make an actor [*i.e.,* an agency] responsible

for an effect and those that do not.'" *Id.* (quoting *Metropolitan Edison*, 460 U.S. at 774 & n. 7). Yet the decision below expressly rejected this standard in favor of the Ninth Circuit's own, alternative standard.

1. *Metropolitan Edison* arose after a well-known accident damaged one of two reactors at Three Mile Island, and after the NRC authorized the restart of the undamaged reactor. An association of local residents who opposed further operation of the facility intervened in the restart proceedings, alleging that NEPA required the NRC to analyze in its supplemental EIS the potential effects of the agency's action on psychological health and community well-being. 460 U.S. at 768-69.

This Court began by observing that "NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment." 460 U.S. at 772 (emphasis in original). The Court further reasoned that the term "environmental effect" must be read to require "a reasonably close causal relationship between a change in the physical environment and the effect at issue." *Id.* at 774. The Court emphasized that "but for" causation is not sufficient to make an asserted effect cognizable under NEPA. *Ibid.* Rather, the Court held that the statute requires a "reasonably close causal relationship," similar to the tort law doctrine of proximate cause. *Ibid.* The Court reasoned that "[t]ime and resources are simply too limited" to further extend the statute and that spreading agency resources too thin would inhibit, rather than promote, protection of the environment. *Id.* at 776.

Applying this "proximate cause" test, the Court next considered whether there was a proximate relationship between resumed operation of the reactor (the change in the physical environment permitted by the agency's action) and psychological distress and other health effects from the perceived risk of a post-restart accident (the alleged effects at issue). 460 U.S. at 774-75. The Court found the "causal

chain" to be "too attenuated" (*id.* at 774), inasmuch as "the element of risk and its perception by [the concerned residents] are necessary middle links." *Id.* at 775. The Court concluded that the alleged effect was "simply too remote from the physical environment" to require an EIS under NEPA. *Id.* at 774. And the Court observed that "[u]ntil Congress provides a more explicit statutory instruction than NEPA now contains, we do not think agencies are obliged to undertake the inquiry." *Id.* at 778.

2. *Public Citizen* reaffirmed the *Metropolitan Edison* proximate causation test and clarified that it extends to the link between an *agency action* and a future effect. *Pub. Citizen*, 541 U.S. at 759-60. The case arose after the President announced his intent to lift a moratorium prohibiting Mexican motor carriers from obtaining operating authority within the United States. The Federal Motor Carrier Safety Administration ("FMCSA") subsequently proposed rules establishing certain financial and safety requirements for Mexican motor carriers. *Id.* at 759-60. The FMCSA also issued an EA for the proposed rules, but the EA did not consider the environmental impact of the Mexican carriers' increased cross-border operations. *Id.* at 761. The agency reasoned that any such impact would be the effect of the *President's* modification of the moratorium, not the *agency's* implementation of the regulations. *Ibid.* The court of appeals disagreed, and found the agency's EA deficient because it failed to consider the "reasonably foreseeable" effect of increased emissions caused by the entry of Mexican trucks. *Id.* at 762-63.

On review, this Court first inquired whether the Mexican carriers' increased cross-border operations, with the correlative release of emissions by Mexican trucks, was an "effect" of FMCSA's issuance of the proposed rules. 541 U.S. at 764. The Court characterized the respondents' argument as "a particularly unyielding variation of 'but for' causation, where an agency's action is considered a cause of

an environmental effect even when the agency has no authority to prevent the effect." *Id.* at 767 (citing *Metropolitan Edison*, 460 U.S. at 774).

Instead of applying a "but-for" causation test, the Court, reiterating *Metropolitan Edison*, held that whether a particular environmental "effect" must be considered under NEPA depends upon whether there exists "'a reasonably close causal relationship' between the environmental effect and the alleged cause." *Pub. Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774). Moreover, as in *Metropolitan Edison*, the Court reiterated that this standard is analogous "to the 'familiar doctrine of proximate cause from tort law,'" and therefore provides "'a manageable line between those causal changes that may make an actor [*i.e.*, an agency] responsible for an effect and those that do not.'" *Ibid.* (quoting *Metropolitan Edison*, 460 U.S. at 774 n. 7).

Applying this test, the Court found that the agency had no authority to refuse admission of the Mexican motor carriers if the carriers met certain requirements contained in FMCSA regulations. 541 U.S. at 766-68. Accordingly, any pollution from Mexican motor carriers, *even if foreseeable*, was not an "effect" that the agency needed to consider because no "action" by the agency would "cause" Mexican motor carriers to enter the United States. As in the past, the Court also emphasized that inherent in NEPA is a "rule of reason" that requires consideration of the *usefulness* of any new potential information to the decision-making process. *Id.* at 767-68.

3. Here, in applying a NEPA "rule of reason" to determine whether it needed to analyze the environmental impacts of terrorist attacks, the NRC expressly applied the *Metropolitan Edison* causation standard. Relying upon that standard, the NRC noted that "where the link between the agency action and the claimed impact is too attenuated to find the proposed federal action to be the 'proximate cause' of the impact," NEPA requires no discussion of that impact.

Pet. App. 53a (citing *Metropolitan Edison*, 460 U.S. at 772-75) (other citations omitted).

The NRC then correctly concluded that its licensing of the ISFSI could not reasonably be viewed as the "proximate cause" of the effects of a terrorist attack. Pet. App. 53a-54a. As the agency put it, "the causal relationship between approving the [] facility and a third party deliberately flying a plane into it is too attenuated to require a NEPA review, particularly where the terrorist threat is entirely independent of the facility." *Id.* at 55a. In other words, any effects of terrorist attacks would be proximately caused by terrorists, not the NRC.[2]

4. The Ninth Circuit held that the NRC erred in applying the *Metropolitan Edison* standard and flatly declared that "*Metropolitan Edison* and its proximate cause analogy are inapplicable here." Pet. App. 20a. Instead, the Ninth Circuit held that the appropriate analytical approach is the one the Ninth Circuit had used in *No GWEN Alliance*

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[2] As in tort law, a proximate cause analysis incorporates elements of certainty, foreseeability, and probability. It also considers any public policy considerations germane to the issue of legal responsibility. See, *e.g.*, *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) ("[T]he notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'"). See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 264, 274-275 (5th ed. 1984). In effect, in imposing security requirements under the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §§ 2011-2297g, the NRC has already made an expert determination on the extent of its licensees' responsibility for the security of nuclear facilities. Although the Ninth Circuit found it "difficult to reconcile" the Commission's position on NEPA with its ongoing AEA-based security reviews (Pet. App. 23a), it is those very AEA-based reviews that make it unnecessary to stretch NEPA into threat assessment and that provide an additional policy basis for the NRC's "proximate cause" determination in the present case.

v. *Aldridge*, 855 F.2d 1380 (9th Cir. 1988), which expressly rejected the *Metropolitan Edison* standard in favor of a "remote and highly speculative" probability standard. *No GWEN*, 855 F.2d at 1385-86 (quoting *Warm Springs Dam Task Force* v. *Gribble*, 621 F.2d 1017, 1026-27) (9th Cir. 1980)). Under that standard, an alleged effect must be included in the agency's NEPA analysis *unless* that effect is "remote and highly speculative."

The court attributed its refusal to apply *Metropolitan Edison* in this case to a footnote in that decision, which the court read as limiting this Court's holding to situations involving "effects caused by the *risk* of accident." Pet. App. 20a (quoting 460 U.S. at 775 n. 9) (emphasis added). But the court of appeals failed even to acknowledge this Court's holding in *Public Citizen*, which makes clear that the *Metropolitan Edison* standard applies across the board. See 541 U.S. at 767.[3]

In sum, the decision below squarely rejected the legal causation standard that this Court has twice held to govern the determination whether a particular environmental effect must receive plenary review under NEPA.

B. The Decision Below Conflicts With Decisions In Two Other Circuits, And Is In Substantial Tension With A Decision Of Yet Another Circuit

In rejecting this Court's "proximate cause" standard, the decision below also placed the Ninth Circuit in square conflict with the D.C. and Second Circuits, and in substantial tension with the Eighth Circuit.

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[3] The passages from *Metropolitan Edison* cited by the Ninth Circuit related to this Court's specific application of the proximate cause standard; they did not purport to limit the *applicability* of the standard. Compare Pet. App. 20a-21a with *Metropolitan Edison*, 460 U.S. at 773-77.

1. The Ninth Circuit's decision conflicts with the D.C. Circuit's opinion in *Glass Packaging Institute* v. *Regan*, 737 F.2d 1083 (D.C. Cir. 1984). There the D. C. Circuit rejected a challenge to a decision of the Bureau of Alcohol, Tobacco, and Firearms ("BATF") to allow the packaging of liquor in plastic bottles. In permitting the use of plastic bottles, the BATF had prepared an environmental assessment that the petitioners criticized for failing to consider the potential injury or death that could result from sabotage of the bottles by "deranged" criminals. 737 F.2d at 1091.

As one of two alternative holdings,[4] the D.C. Circuit rejected as "specious" the claim that potential harm resulting from such sabotage must be evaluated under NEPA where it is caused by "reasonably foreseeable criminal acts of third parties." 737 F.2d at 1091-92. Relying upon *Metropolitan Edison's* "proximate cause" analysis, the D.C. Circuit held that "mere foreseeability does not trigger a duty to consider an alleged environmental effect" (*id.* at 1091), and that "[t]he limits to which NEPA's causal chain may be stretched before breaking must be defined by the policies and legislative intent behind NEPA." *Id.* at 1091-92. The court concluded that, under a proximate cause analysis, the causal link between possible sabotage of plastic bottles and BATF's approval of those bottles was simply too attenuated to "tip the scale" in favor of mandatory NEPA review. *Id.* at 1093 (citations omitted).

As noted above, by contrast, the Ninth Circuit expressly rejected this Court's proximate cause test and applied the "remote and highly speculative" standard previously articulated by the Ninth Circuit in *No GWEN*. Although the Ninth Circuit did not explicitly state that "mere

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[4] The court also held, in the alternative, that criminal tampering with plastic beverage bottles "is definitely not an *environmental* consequence under any reasonable interpretation of [NEPA]." 737 F.2d at 1094 (emphasis added).

foreseeability"—as opposed to the "reasonable foreseeability" normally required in the tort-law context—is enough for purposes of NEPA, that is the necessary implication of its holding. Thus, in the D.C. Circuit, "reasonable foreseeability" is required, whereas in the Ninth Circuit it is not.

This difference, moreover, would clearly be outcome-determinative in future cases. For example, if the D.C. Circuit had applied the Ninth Circuit's test in *Glass Packaging*, it undoubtedly would have held that the BATF *was* required to consider the possibility of sabotage as part of its NEPA review. The risk of tampering with plastic bottles was concededly foreseeable (in the "mere foreseeability" sense) and, therefore, at least somewhat greater than "remote and highly speculative." By contrast, if the Ninth Circuit had applied the stricter "proximate cause" analysis from *Metropolitan Edison*, as the D.C. Circuit did in *Glass Packaging*, it would have been constrained to affirm the NRC's finding that approving a spent fuel storage facility is *not* the "proximate cause" of any sabotage that might subsequently occur at that facility. Allowing for the fact that these two decisions arose in the context of different agency actions and different forms of sabotage, the conflict between them could hardly be more stark.

2. The Ninth's Circuit decision also conflicts with the Second Circuit's decision in *City of New York* v. *U.S. Department of Transportation*, 715 F.2d 732 (2d Cir. 1983). The court there rejected a challenge to a Department of Transportation ("DOT") rule designed to reduce the risk of transporting large quantities of radioactive materials by highway where, among other things, the agency had determined that an EIS was not necessary. The Second Circuit reversed a finding by the district court that DOT was "obligated" to address the risk of sabotage in its NEPA analysis. 715 F.2d at 750. The court stated that "[w]ith respect to environmental consequences that are only remote

possibilities, an agency must be given some latitude to decide what sorts of risks it will assess." *Ibid.* (citations omitted). The court found that DOT had correctly concluded that "the risks of sabotage were *too far afield* for consideration" under NEPA. *Ibid.* (emphasis added).

The Second Circuit's use of the phrase "too far afield" indicates that it applied a proximate cause analysis—*i.e.*, it believed there was no "reasonably close causal relationship" between the environmental impacts of a terrorist attack and the agency action at issue. In short, it followed an analysis like that applied by this Court in *Metropolitan Edison*. And, unlike the Ninth Circuit, the Second Circuit did *not* require the agency to demonstrate that the risk of terrorist activity was "remote" and "highly speculative" to avoid considering the issue as part of its NEPA analysis.

Here again, the Second Circuit, if it followed its precedent, would have decided this case differently than the Ninth Circuit did. Conversely, if the Ninth Circuit followed its reasoning in this case, it would almost certainly decide a case like *City of New York* against the federal agency. The risk that the highway transportation of large quantities of radioactive materials *could* lead to sabotage may be low, but that risk is no more "remote" or "speculative" than the risk that a terrorist would attack one particular spent fuel storage site. In short, there is a clear conflict between the Ninth and Second Circuits.

3. The Ninth Circuit's decision is also in substantial tension with the Eighth Circuit's decision in *Mid States Coalition for Progress* v. *Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003), which involved a proposal to construct and upgrade rail lines. There the Eighth Circuit rejected a claim that the Surface Transportation Board ("Board") violated NEPA when it declined to reopen the record and supplement its EIS to consider concerns arising from the terrorist attacks of September 11, 2001. 345 F.3d at 544. The Eighth Circuit held that such requests were subject to the

"rule of reason," and that the agency should be accorded deference as long as its decision is not arbitrary and capricious. *Ibid.* (citing *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989)). In regard to the issue of terrorism, the court acknowledged that "the events of September 11, 2001, have certainly raised awareness of the potential threats to our nation's transportation systems." *Ibid.* The court nonetheless held that "the Board exercised its permissible discretion when it determined that any increased threat was general in nature and did not bear specifically on [petitioners] or the proposed * * * project." *Ibid.*

Although the Eighth Circuit's analysis focused on the distinction between "general" and "specific" threats, it clearly requires something more than the Ninth Circuit has now held sufficient to trigger NEPA's requirement—*i.e.*, anything that is not "remote and highly speculative." If the Ninth Circuit had applied the Eighth Circuit's test here, it would have been forced to concede as a matter of law that the "increased threat" of terrorism was a "general" threat that does "not bear specifically on the [PG&E] project." And, therefore, the Ninth Circuit would have had to conclude that NEPA's requirements were *not* triggered.[5]

II. The Ninth Circuit's Decision On The NRC's Ability To Exclude Unquantifiable Risks Conflicts With Decisions Of This Court, With CEQ Regulations, And With Decisions In Other Circuits

The Ninth Circuit also encroached on the NRC's broad discretion in rejecting the agency's conclusion that "the likelihood of attack cannot be ascertained with confidence

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[5] See also *City of Shoreacres* v. *Waterworth*, 420 F.3d 440, 451-53 (5th Cir. 2005) (discussing *Public Citizen* in dictum and stating that "a plaintiff mounting a NEPA challenge must establish that an alleged effect will ensue as a 'proximate cause,' in the sense meant by tort law, of the proposed agency action").

by any state-of-the-art methodology" and, therefore, that NRC had "no means to assess, usefully, the risks of terrorism * * * " for purposes of its NEPA review. Pet. App. 55a. The Ninth Circuit rejected that reasoning, holding that an agency's inability to quantify the risk of sabotage, in a way that is meaningful under NEPA, does not allow the agency "to eliminate a possible environmental consequence from analysis" under NEPA. Pet. App. 25a-26a. The Ninth Circuit's holding warrants review because it is inconsistent with NEPA, as implemented by the NRC and CEQ and as construed by this Court, and because it conflicts with the law of the Third Circuit.

A. The Ninth Circuit's Decision Is Erroneous Under The Controlling Authorities

CEQ regulations speak directly to this issue.[6] Indeed, the CEQ amended 40 C.F.R. § 1502.22 in 1986 (in light of *Metropolitan Edison)* to require consideration of "reasonably foreseeable" impacts in lieu of the "worst case" analysis that the regulation had previously required. See 51 Fed. Reg. 15,618, 15,621-25 (Apr. 25, 1986). That regulation now provides that where there is "incomplete or unavailable information," an EIS must still be "based upon theoretical approaches or research methods generally accepted in the scientific community, * * * provided that the analysis of the

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[6] The Commission has complied with NEPA by issuing its own regulations governing its consideration of the environmental impact of licensing actions. See 10 C.F.R. §§ 51.1-.125. The NRC's regulations are based on the CEQ regulations. Section 51.10(a) refers to "the Commission's announced policy to take account of the regulations of the [CEQ] published November 29, 1978 (43 Fed. Reg. 55,978-56,007) voluntarily, subject to certain conditions." In the *Private Fuel Storage* case, the Commission noted that it gives CEQ regulations "substantial deference." Pet. App. 51a. See also *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979) (holding that CEQ regulations are entitled to "substantial deference").

impacts is supported by *credible scientific evidence, is not based on pure conjecture, and is within the rule of reason* * * * ." 40 C.F.R. § 1502.22(b)(4) (emphasis added).[7]

The CEQ's standard was explicitly approved by this Court in *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989). As the Court observed, the amended regulation does not necessarily foreclose an agency's duty to consider remote but potentially severe impacts. 490 U.S. at 354. But it "grounds the duty in evaluation of scientific opinion rather than in the framework of a conjectural 'worst case analysis.'" *Id.* at 354-55 (citation omitted). The Court further explained that, by requiring an EIS to "focus on reasonably foreseeable impacts," (*id.* at 356), the amended rule "'will generate information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision * * * rather than distorting the decisionmaking process by overemphasizing highly speculative harms.'" *Ibid.* (citations omitted).

Here, acting within the "rule of reason" and permissible discretion under NEPA, the NRC determined that "attempts to evaluate th[e] risk" of a terrorist attack, "even in qualitative terms are likely to be meaningless and consequently of no use in the agency's decisionmaking" under NEPA. Pet. App. 39a. (Indeed, Mothers for Peace had conceded that any such analysis would be "qualitative." Pet. App. 72a-74a.) The agency observed that it has no way to calculate the probability of an attack on a specific facility and declined merely to *assume* that the facility is at risk. Pet.

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[7] Although these CEQ regulations expressly govern an EIS rather than an EA, the same principles apply *a fortiori* to an EA. If, as the regulation shows, an agency cannot be required to consider in an EIS an alleged risk that is based on "pure conjecture" and that is not "supported by credible scientific evidence," it cannot be required to consider such a risk in an EA. The standard for an EA cannot be broader than for an EIS.

App. 57a. Such an assumption, the NRC stated, "would transform the NEPA analysis into a form of guesswork and distort NEPA's cost-benefit calculus." *Ibid.* Such an approach would contravene the CEQ regulations, as well as this Court's decisions approving those regulations, insofar as the regulations clearly reject any need for conjectural and "worst case" analysis. See 51 Fed. Reg. at 15,621-24.

But the Ninth Circuit refused to accord the NRC's determination the deference it deserves. See, *e.g.*, *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 103 (1983). Instead, substituting its judgment for that of the NRC, the Ninth Circuit held that the NRC's inability to quantify the risk of sabotage does not allow it "to eliminate a possible environmental consequence from analysis" under NEPA. Pet. App. 25a.[8] Even worse, rather than requiring those challenging the NRC's conclusions to demonstrate, through reliable evidence, that a terrorist attack on the specific proposed facility is "reasonably foreseeable," the Ninth Circuit improperly reallocated the burden of proof to the NRC in holding that *the NRC* "has not established that the risk of a terrorist attack is unquantifiable." *Id.* at 26a.

B. The Decision Below Placed The Ninth Circuit In Conflict With The Third Circuit On This Important Issue

The Ninth Circuit's decision is directly contrary to the majority opinion of the Third Circuit in *Limerick Ecology Action, Inc.* v. *NRC*, 869 F.2d 719 (3rd Cir. 1989). On the

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[8] The Ninth Circuit erred for an additional reason. Consistent with NRC regulations that direct qualitative analysis of factors that cannot be quantified (see, *e.g.*, 10 C.F.R. § 51.71(d)), the NRC specifically noted that "stochastic" criminal terrorist acts are not within the "range of likely impacts" which, even if not subject to precise measurement or quantification, the agency "can say with some degree of certainty * * * will take place." Pet. App. 49a-50a, 59a. The Ninth Circuit ignored this assessment.

NRC's argument regarding its ability to quantify risk and perform a meaningful analysis, the court cited as its only authority the *dissent* in *Limerick*. Pet. App. 25a. The Ninth Circuit's decision, however, squarely conflicts with the majority opinion in *Limerick*, and in two separate respects.

First, the majority opinion is flatly inconsistent with the Ninth Circuit's holding that an inability to quantify the risk of sabotage cannot justify exclusion of that risk from the agency's NEPA analysis. In *Limerick*, the majority held that the NRC had *not* acted arbitrarily and capriciously in deciding not to evaluate the risk of sabotage in an EIS, based on the agency's conclusion that "sabotage risk analysis is beyond current probabilistic risk assessment methods and that there is no current basis by which to measure such risk." 869 F.2d at 743. The Third Circuit found that this agency conclusion satisfied NEPA's "hard look" requirement and emphasized that this was a determination in an area where courts are to "be at [our] most deferential." *Ibid.* (quoting *Baltimore Gas*, 462 U.S. at 103). The Ninth Circuit failed even to mention this holding, although its citation of the *Limerick* dissent strongly suggests an awareness of the majority's opinion.

Second, even assuming that an inability to perform a meaningful analysis would not foreclose a NEPA review as a matter of law, the Ninth Circuit's decision conflicts with *Limerick* in holding that it is the *agency*, not the party challenging the decision, that bears the burden of proof on the issue of quantifiability. Pet. App. 26a. Throughout this portion of its opinion, the Ninth Circuit made clear that it was placing this burden on the NRC. For example, at one point the Ninth Circuit held that "the *agency* fails to adequately show that the risk of a terrorist act is unquantifiable." Pet. App. 25a (emphasis added). And then at the end of that discussion, the Ninth Circuit reiterated its holding that "*the NRC* has not established that the risk of a terrorist attack is unquantifiable." *Id.* at 26a (emphasis

added). Nowhere did the Ninth Circuit suggest that NRC critics and project opponents bear any burden on this issue.

This too flatly conflicts with the majority decision in *Limerick*. The majority there repeatedly made clear that, once the expert agency articulates its view that the risk is not quantifiable, the party challenging that conclusion bears the burden of proof on that issue. Early in its discussion, for example, the majority stated: "[W]e believe that LEA"—the petitioner there—"has mischaracterized this issue by casting it in terms of *the NRC's burden* to prove its asserted inability to quantify or predict sabotage risk." 869 F.2d at 743 (emphasis added). The majority continued that, "[t]o prevail here, LEA should have advanced some method or theory by which the NRC could have entered into a meaningful analysis of the risk of sabotage despite its asserted inability to quantify the risks." *Id.* at 744. The majority concluded that, "[w]here LEA failed to meet *its burden* * * * we cannot conclude that the NRC acted arbitrarily and capriciously by refusing to litigate this issue." *Ibid.* (emphasis added); *accord id.* at 744 n. 31 (noting that "LEA has failed to carry its burden to rebut the NRC's claim that it cannot meaningfully consider the issue").

This difference in approach is dispositive on this point as well. Had the Ninth Circuit followed the Third Circuit's approach, it would have been forced to concede that a proper conclusion by the NRC that the risk of sabotage cannot be meaningfully quantified would be sufficient to exclude the sabotage issue from the agency's NEPA review. And the Ninth Circuit could not simply have granted the petition on the ground that the NRC had failed to carry its burden of establishing this point. To the contrary, if the Ninth Circuit felt that Mothers for Peace (notwithstanding the NRC's unimpeachable conclusion to the contrary) had legitimate evidence that the risk of a terrorist attack *is* quantifiable, the most the court could have done would have been to remand to the agency to determine, in the first

instance, whether the petitioner had carried *its* burden of establishing quantifiability.

III. The Decision Below Will Have Widespread Adverse Practical Consequences

Certiorari is also warranted because the Ninth Circuit's decision, if left to stand, will have far-reaching, adverse ramifications for PG&E and private applicants before the NRC and other federal agencies, for government resources, and for national security.

A. The Ninth Circuit's Decision Will Unduly Burden PG&E and Other Participants In The NRC Regulatory Process Without Advancing NEPA's Goals

The Ninth Circuit's decision threatens to increase substantially the burdens of the NEPA review in this and other NRC proceedings and thus flouts this Court's observation that "[t]he scope of the agency's inquiries must remain manageable if NEPA's goal of 'ensur[ing] a fully informed and well considered decision' * * * is to be accomplished." *Metropolitan Edison*, 460 U.S. at 776 (citing *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551, 558 (1978).

1. Nominally, the Ninth Circuit's decision requires the NRC to consider further the petitioners' "factual contentions" that the licensing of the Diablo ISFSI "would lead to or increase the risk of a terrorist attack because (1) the presence of the [ISFSI] would increase the probability of a terrorist attack on the Diablo Canyon nuclear facility, and (2) the Storage Installation itself would be a primary target for a terrorist attack." Pet. App. 21a. However, by its nature, an assessment of these issues would require a detailed terrorist threat assessment focusing on such issues as the current and future threat environment, the relative "attractiveness" of the ISFSI as a terrorist target, and the vulnerability (or relative "hardness") of the facility as a

terrorist target. Such assessments almost inevitably would lead to a further assessment of the capabilities of putative attackers, the consequences of postulated attacks, fanciful mitigation measures, and alternative design concepts. Such an extension of NEPA into the realm of threat assessment would place an unnecessary and duplicative burden on PG&E (and, indeed, other private parties) that are already addressing many of these issues through post-9/11 security reviews and inspections, security upgrades, security orders, and a rulemaking. It may also divert resources of the agency staff and other federal law enforcement agencies to participate in a potentially open-ended remand process.

2. The impact of the Ninth Circuit's decision, moreover, would not be limited to this NRC licensing proceeding. The logic of the Ninth Circuit's decision would compel the NRC to consider the risk of terrorism in all pending and future power reactor licensing actions—for PG&E and other applicants. Those proceedings would include waste storage licensing and amendment proceedings, power plant license renewal applications, new power plant license applications, and the Yucca Mountain high-level waste repository project. This would have a substantial impact on PG&E, the industry, and NRC resources as well as the predictability and efficiency of NRC licensing proceedings. The resultant transformation of NRC proceedings into "amorphous public extravaganzas" on the speculative effects of postulated terrorist attacks would impede the important national policy objective of streamlining NRC licensing processes. See *Bellotti* v. *NRC*, 725 F.2d 1380, 1382 (D.C. Cir. 1983); see also *Citizens Awareness Network, Inc.* v. *United States*, 391 F.3d 338, 343 (1st Cir. 2004) (noting the "very lengthy" duration of past NRC hearings and NRC efforts to improve hearing efficiency).

3. On the other hand, the adjudication of speculative claims positing terrorist attacks on the Diablo Canyon ISFSI, or on any other nuclear facility, would yield no benefit to

the applicants, the NRC or the public, especially when considered in light of the additional burden imposed by such a review. As the *Limerick* majority recognized, without reasonable estimates of an event's probability, the "risk" cannot be properly characterized. 869 F.3d at 743-44. And, as the NRC recognized, any attempt to analyze such "risks" without meaningful data will tend to "exaggerate a project's risks and unduly alarm the public." Pet. App. 58a.

Moreover, as noted above, the NRC and the nuclear industry have enhanced substantially the already robust security measures required by the AEA and NRC regulations in response to the events of September 11, 2001. See, *e.g.*, 10 C.F.R. Part 73. The agency's review and enhancement of its security requirements is an ongoing process, intended to ensure that the risk of a terrorist attack remains remote. Because a process is already in place to address nuclear security, the assessment of hypothetical terrorist attacks under the rubric of NEPA would not add meaningfully, if at all, to NRC decision making. Cf. *Romer* v. *Carlucci*, 847 F.2d 445, 457 (8th Cir. 1988) (finding that NEPA review of nuclear missile basing decision would not be of "decisional significance" given the availability of "comprehensive information").

4. Similarly, additional review would not serve NEPA's informational purpose. The sensitivity of the information pertinent to such a review would generally preclude its release to the public. Therefore, the development of an EIS that addresses terrorism impacts likely would not provide a useful "springboard for public comment," nor would it ensure that "the larger audience" can provide input as necessary to the NRC. *Pub. Citizen*, 541 U.S. at 768 (quoting *Baltimore Gas*, 462 U.S. at 97).

B. The Ninth Circuit's Decision Would Adversely Impact Other Private Applicants and Federal Agency Actions

The Ninth Circuit's decision also has implications for activities authorized or conducted by other federal agencies. The prospect of terrorist attacks is not confined to any one industry. Adoption of the court's logic would necessitate that any agency conducting a NEPA review for a proposed chemical plant, oil pipeline, liquefied natural gas pipeline, skyscraper, dam, bridge, or tunnel somehow establish that terrorist attacks on such a facility are highly speculative or else postulate a successful attack and evaluate its environmental consequences. This will place new burdens on many future private applicants.

For most private parties and many federal agencies, requiring terrorism reviews under NEPA would strain resources and erode the efficacy of permitting, licensing, and other approval processes. This would require applicants and agencies to expend "considerable resources" developing security expertise "not otherwise relevant to their congressionally assigned functions." *Metropolitan Edison*, 460 U.S. at 776. And ironically, the Ninth Circuit's extraordinary expansion of NEPA—the result of its failure to perform the requisite causation analysis—would do nothing to further protection of the environment.

C. The Ninth Circuit's Decision Creates Uncertainty And Potential Delay for PG&E at the Diablo Canyon Nuclear Power Plant

The Ninth Circuit's decision creates uncertainty for the timing of the operation of the Diablo Canyon spent fuel storage facility at issue here. Consistent with its obligations under the NWPA and to electricity consumers in California, PG&E must provide additional spent fuel storage capacity to support the continued, productive operation of the Diablo Canyon power plant. Accordingly, PG&E designed and

licensed the ISFSI to meet this need and plans to begin loading spent fuel from the wet pools into dry storage casks in November 2007. Presently, however, it is not known whether the NRC will foreclose operation of the ISFSI in 2007.[9] It is also not known how long the remand proceedings required by the decision below (or any related judicial review) will last. Clearly, PG&E's dry storage plans could be adversely impacted by the remand.[10] Review by this Court is needed to resolve the uncertainties and practical problems the Ninth Circuit decision poses for PG&E and its customers.

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[9] The Ninth Circuit decision did not invalidate, vacate or stay the license for the ISFSI, and therefore does not affect PG&E's authority to load fuel in that facility. See *Amoco Prod.* v. *Vill. of Gambell*, 480 U.S. 531, 542 (1987)) (*citing Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311 (1982)) (injunctive relief is an "extraordinary" equitable remedy that "does not issue as of course"). However, the petitioners have requested from the NRC declaratory or equitable relief that would prevent PG&E from loading spent fuel. While the NRC has denied the immediate request for such relief, it has deferred the question of PG&E's authority to begin operation of the ISFSI. See *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-23, 64 N.R.C. __, slip op. (Sept. 6, 2006).

[10] As a contingency, PG&E has obtained NRC approval of a "wet storage" alternative that would provide storage to support continued plant operation until 2010-2011. The failure to resolve *fully* the remanded issue by the 2010-2011 timeframe could result in an interruption of service at Diablo Canyon. This alternative involves the installation and use of temporary spent fuel storage racks in the existing spent fuel pools at Diablo Canyon. These racks have yet to be installed. The wet storage option is decidedly *not* the preferred storage option from the operational, public safety, security, or economic perspectives.

D. The Ninth Circuit's Decision Raises Serious National Security Concerns

The Ninth Circuit's holding also raises significant national security concerns. The Ninth Circuit's decision requires some level of public participation in the remand process, and the NRC traditionally has addressed NEPA reviews through the formal adjudicatory process. As the NRC noted, "[a] full-scale NEPA process inevitably would require examination not only of how terrorists could cause maximum damage but also of how they might best be thwarted." Pet. App. 64a. Such an assessment would require access to highly sensitive national security information held by the licensees, the NRC, and other government agencies. Disclosure of such information to members of the public, though subject to rigorous (and cumbersome) procedural protections, would create a very real risk that classified or security information could be released, possibly to the detriment of nuclear safety and security.

As the NRC explained, such a result would be contrary to the NRC's statutory mandate under the AEA to withhold from the public domain any information that could jeopardize the common defense and security. Pet. App. 64a-65a. Section 147 of the AEA requires the NRC to prohibit unauthorized disclosures of security-related information. See 42 U.S.C. § 2167(a). NEPA does not override that statutory obligation. To the contrary, NEPA requires agencies to implement the statute's policies using "all practicable means, consistent with other essential considerations of national policy." 42 U.S.C. § 4331(b).

The NRC expressed deep concerns regarding any process with public participation on security issues. Pet. App. 39a, 62a-65a. The Ninth Circuit dismissed those concerns and suggested that they could be mitigated by procedural controls. Pet. App. 29a-30a. However, it is the NRC that Congress has charged with ensuring the safety

and integrity of nuclear facilities. And, it is the NRC that has conducted proceedings on nuclear security matters and accumulated experience on the risks and benefits of the process. Accordingly, the NRC's judgments about these issues are entitled to the highest respect and deference—deference that was completely absent from the decision below.

* * * * *

Especially in the post-9/11 world, courts should be solicitous of the views of federal agencies charged with protecting the public from terrorist threats. The Ninth Circuit's decision not only flouts the views of the federal agency charged by Congress with regulating nuclear energy, it does so in a manner that flouts controlling decisions of this Court and creates needless conflicts with sister circuits. The decision needs to be reversed, either summarily or as a result of plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 2006

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-74628

SAN LUIS OBISPO MOTHERS FOR PEACE;
SANTA LUCIA CHAPTER OF THE SIERRA CLUB;
PEG PINARD
PETITIONERS

PACIFIC GAS AND ELECTRIC COMPANY,
INTERVENOR
v.
NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA
RESPONDENTS

On Petition for Review of an Order of the Nuclear Regulatory Commission.
NRC No. CLI-03-01; CLI-02-23.

Argued and Submitted Oct. 17, 2005.

Filed June 2, 2006.

Before REINHARDT and THOMAS, Circuit Judges, and JANE A. RESTANI,* Chief Judge, United States Court of International Trade.

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* The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

THOMAS, Circuit Judge.

This case presents the question, *inter alia,* as to whether the likely environmental consequences of a potential terrorist attack on a nuclear facility must be considered in an environmental review required under the National Environmental Policy Act. The United States Nuclear Regulatory Commission ("NRC") contends that the possibility of a terrorist attack on a nuclear facility is so remote and speculative that the potential consequences of such an attack need not be considered at all in such a review. The San Luis Obispo Mothers for Peace and other groups disagree and petition for review of the NRC's approval of a proposed Interim Spent Fuel Storage Installation. We grant the petition in part and deny it in part.

I

The NRC is an independent federal agency established by the Energy Reorganization Act of 1974 to regulate the civilian use of nuclear materials. Intervenor Pacific Gas and Electric Company ("PG&E") filed an application with the NRC under 10 C.F.R. Part 72 for a license to construct and operate an Interim Spent Fuel Storage Installation ("Storage Installation" or "ISFSI") at PG&E's Diablo Canyon Power Plant ("Diablo Canyon") in San Luis Obispo, California. The NRC granted the license. The question presented by this petition for review is whether, in doing so, the NRC complied with federal statutes including the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4437, the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §§ 2011-2297g, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706.

NEPA establishes a "national policy [to] encourage productive and enjoyable harmony between man and his environment," and was intended to reduce or eliminate environmental damage and to promote "the understanding of the ecological systems and natural resources important

to" the United States. *Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 756, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004) (quoting 42 U.S.C. § 4321). The Supreme Court has identified NEPA's "twin aims" as "plac[ing] upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action[, and] ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983).

Rather than mandating particular results, NEPA imposes on federal agencies procedural requirements that force consideration of the environmental consequences of agency actions. *Pub. Citizen*, 541 U.S. at 756, 124 S.Ct. 2204. At NEPA's core is the requirement that federal agencies prepare an environmental impact statement ("EIS"), or:

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. at 757 (quoting 42 U.S.C. § 4332(2)(C)).

As an alternative to the EIS, an agency may prepare a more limited environmental assessment ("EA") concluding in a "Finding of No Significant Impact" ("FONSI"), briefly presenting the reasons why the action will not have a

significant impact on the human environment. *Id.* at 757 (citing 40 C.F.R. §§ 1501.4(e), 1508.13). If, however, the EA does not lead to the conclusion that a FONSI is warranted, the agency remains obligated to prepare an EIS. *Id.* at 757.

While NEPA requires the NRC to consider environmental effects of its decisions, the AEA is primarily concerned with setting minimum safety standards for the licensing and operation of nuclear facilities. The NRC does not contest that the two statutes impose independent obligations, so that compliance with the AEA does not excuse the agency from its NEPA obligations. The AEA lays out the process for consideration of the public health and safety aspects of nuclear power plant licensing, and requires the NRC to determine whether the licensing and operation of a proposed facility is "in accord with the common defense and security and will provide adequate protection to the health and safety of the public." 42 U.S.C. § 2232(a).

The NRC is not, however, required to make this determination without assistance; federal law provides a framework for hearings on material issues that interested persons raise by specific and timely petition. 42 U.S.C. § 2239(a); 10 C.F.R. §§ 2.308-.348; 5 U.S.C. §§ 551-706. The initial hearing is held before a three-person Atomic Safety and Licensing Board ("Licensing Board"). 10 C.F.R. § 2.321. The Licensing Board's findings and decision constitute the agency's initial determination, although a party may file a petition for review with the Commission within 15 days of the Licensing Board's decision. 10 C.F.R. § 2.341. If the petition is granted, the Commission specifies the issues to be reviewed and the parties to the review proceedings, 10 C.F.R. § 2.341(c)(1), and renders a final decision. 10 C.F.R. § 2.344. A party may then petition this court for review of the Commission's final decision. 28 U.S.C. § 2344.

II

With this general statutory background, we turn to the facts underlying the petition for review. On December 21, 2001, PG&E applied to the NRC pursuant to 10 C.F.R. Part 72 for a license to construct and operate a Storage Installation at Diablo Canyon. The Storage Installation would permit the necessary and on-site storage of spent fuel, the byproduct of the two nuclear reactors at that site. PG&E expects to fill its existing spent fuel storage capacity at Diablo Canyon sometime this year. Therefore, unless additional spent fuel storage capacity is created, the Diablo Canyon reactors cannot continue to function beyond 2006.

PG&E proposes to build a dry cask storage facility. The basic unit of the storage system is the Multi-Purpose Canister ("Canister"), a stainless steel cylinder that is filled with radioactive waste materials and welded shut. The Canisters are loaded into concrete storage overpacks that are designed to permit passive cooling via the circulation of air. The storage casks, or the filled Canisters loaded into overpacks, are then placed on one of seven concrete pads. The Storage Installation would house a total of 140 storage casks, 2 more than the 138 projected to be required for storage of spent fuel generated at Diablo Canyon through 2025.

On April 22, 2002, the NRC published a Notice of Opportunity for Hearing. Under the regulatory scheme, interested parties could then request a hearing or petition for leave to intervene. 10 C.F.R. § 2.309(a). A written hearing request, which must contain the contentions the party wants litigated at the hearing, will be granted if the petitioner has standing, and has posed at least one admissible contention.[1] *Id.*

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[1] In order to be admissible, a contention must: be set forth with particularity, 10 C.F.R. § 2.309(f)(1); provide a specific statement of the disputed issue of law or fact, 10 C.F.R. § 2.309(f)(1)(i); provide

On July 19, 2002, the San Luis Obispo Mothers for Peace, a non-profit corporation concerned with Diablo Canyon's local impact, the Sierra Club, a non-profit corporation concerned with national environmental policy, and Peg Pinard, an individual citizen, (collectively "Petitioners") submitted a hearing request and a petition to intervene, asserting contentions for admission.

In Licensing Board Proceeding LBP-02-23, 56 NRC 413 ("LBP 02-23"), the Atomic Safety and Licensing Board addressed the admissibility of the July 19 petition's five Technical and three Environmental Contentions.[2] One Technical Contention, TC-1, dealing with the state of PG&E's finances, was deemed admissible; the acceptance of at least one contention meant that the petition was granted. Although the Licensing Board deemed two Environmental Contentions, EC-1, dealing with the failure to address

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the basis for the contention, 10 C.F.R. § 2.309(f)(1)(ii); demonstrate that the issue is within the scope of the proceeding, 10 C.F.R. § 2.309(f)(1)(iii); demonstrate that the issue is material to the findings the NRC must make, 10 C.F.R. § 2.309(f)(1)(iv); provide supporting references and expert opinions, 10 C.F.R. § 2.309(f)(1)(v); and provide sufficient information to show the existence of a genuine issue of law or fact, 10 C.F.R. § 2.309(f)(1)(vi).

[2] Technical Contention Number One ("TC-1") alleged Inadequate Seismic Analysis. TC-2 alleged PG&E's Financial Qualifications Are Not Demonstrated. TC-3 alleged PG&E May Not Apply for a License for a Third Party. TC-4 alleged Failure to Establish Financial Relationships Between Parties Involved in Construction and Operation of Installation. TC-5 alleged Failure to Provide Sufficient Description of Construction and Operation Costs. Environmental Contention Number One ("EC-1") alleged Failure to Address Environmental Impacts of Destructive Acts of Malice or Insanity. EC-2 alleged Failure to Fully Describe Purposes of Proposed Action or to Evaluate All Reasonably Associated Environmental Impacts and Alternatives. EC-3 alleged Failure to Evaluate Environmental Impacts of Transportation.

environmental impacts of terrorist or other acts of malice or insanity, and EC-3, dealing with the failure to evaluate environmental impacts of transportation of radioactive materials[3] inadmissible, the Licensing Board nonetheless referred the final ruling as to the admissibility of these two contentions to the NRC, "in light of the Commission's ongoing 'top to bottom' review of the agency's safeguards and physical security programs." 56 NRC at 448.

In a memorandum and order, CLI-03-1, 57 NRC 1 ("CLI 03-01"), the NRC accepted the Licensing Board's referral of its decision to reject the environmental contentions related to terrorism. Although the Commission affirmed the Licensing Board's rejection of the contentions, it based its decision on a different rationale. The NRC relied on four prior decisions in which it held that the NEPA does not require a terrorism review.[4] These decisions, most particularly *Private Fuel Storage*, CLI-02-25, 56 NRC 340 (2002), outlined four reasons for this holding: (1) the possibility of terrorist attack is too far removed from the natural or expected consequences of agency action to require study under NEPA; (2) because the risk of a terrorist attack cannot be determined, the analysis is

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[3] Because the Storage Installation is not a permanent repository, this contention assumes the eventual transport of the materials stored there to a permanent site. Among the materials submitted to support the contention were some dealing with possible terrorist or other malicious attacks on the spent fuel while in transit. The ruling on the contention was "referr[ed] * * * to the Commission to the extent terrorism and sabotage matters are proffered in support of its admission." 56 NRC at 453.

[4] Those cases include: *Private Fuel Storage, L.L.C.*, CLI-02-25, 56 NRC 340 (2002) (Storage Installation); *Duke Cogema Stone & Webster* (Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Dominion Nuclear Connecticut, Inc.* (Nuclear Power Station), CLI-02-27, 56 NRC 367 (2002); and *Duke Energy Corp.* (Nuclear Power Station), CLI-02-26, 56 NRC 358 (2002). All four cases were decided on December 18, 2002.

likely to be meaningless; (3) NEPA does not require a "worst-case" analysis; and (4) NEPA's public process is not an appropriate forum for sensitive security issues. The NRC concluded:

> Our decision today rests entirely on our understanding of NEPA and of what means are best suited to dealing with terrorism. Nonetheless, our conclusion comports with the practical realities of spent fuel storage and the congressional policy to encourage utilities to provide for spent fuel storage at reactor sites pending construction of a permanent repository. Storage of spent fuel at commercial reactor sites offers no unusual technological challenges. Indeed, it has been occurring at Diablo Canyon for many years and will continue whether or not we license the proposed Installation.

57 NRC at 7.

In September of 2002, prior to the NRC's decision on the first petition, Petitioners submitted a second petition, this time requesting suspension of the Storage Installation licensing proceeding pending comprehensive review of the adequacy of Diablo Canyon's design and operation measures for protection against terrorist attack and other acts of malice or insanity. Unlike the July 19 petition, this one addressed security measures for the entire Diablo Canyon complex, not merely the Storage Installation. Petitioners explained that 10 C.F.R. § 2.335, which prohibits challenges to any NRC rule or regulation in an adjudicatory proceeding involving initial or renewal licensing, prevented the raising of contentions contesting the adequacy of NRC safety requirements protecting against terrorist or other malicious attacks on the entire complex in the July 19 Petition. Petitioners also stated that 10 C.F.R. § 72.32 prevented them from raising emergency planning contentions in the earlier petition. Thus, Petitioners insisted that the second petition "d[id] not constitute a request for

rulemaking, nor for enforcement action," and instead defined it, without reference to any particular hearing-granting provision of the regulations, as "a request for actions that are necessary to ensure that any licensing decision made by the Commission with respect to the proposed Diablo Canyon Installation complies with the Commission's statutory obligations under the Atomic Energy Act."

In a memorandum and order, CLI-02-23, 56 NRC 230 ("CLI 02-23"), the NRC denied the September 2002 petition. Because the petition did not, according to the NRC, "fit comfortably in any specific category, [the Commission] treat[ed] it as a general motion brought under the procedural requirements of 10 C.F.R. § 2.730."[5] In rejecting the petition, the Commission reasoned that by not suspending operating licenses at installations and power plants following the September 11, 2001 terrorist attacks, it had demonstrated its implicit conclusion that the continued operation of these facilities neither posed an imminent risk to the public health, nor was inimical to the common defense. Further, the Commission concluded that because it had already initiated a thorough review of its safeguards and physical security program, there was no reason to suspend the Diablo Canyon licensing proceeding to address the terrorism-related concerns raised by the Petitioners. It stated that "[t]here certainly is no reason to believe that any danger to public health and safety would result from mere continuation of this adjudicatory proceeding," given that the proceeding was in its initial stages, that construction was not scheduled to begin for several years, and that the Petitioners would be able to comment on any changes in the rules resulting from the Commission's ongoing review of terrorism-related matters if and when they were to occur.

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[5] Since renumbered as 10 C.F.R. § 2.323, this regulation provides, simply, for "motions."

In a memorandum and order, CLI-03-12, 58 NRC 185 (2003) ("CLI 03-02"), the NRC denied the petitions for agency review of the Licensing Board's decisions that "cumulatively, rejected challenges to [the PG&E] Installation application." This denial thus became a final order, reviewable by this court on petition for review. 28 U.S.C. § 2344.

In October of 2003, the Spent Fuel Project Office of the NRC's Office of Material Safety and Safeguards released its Environmental Assessment Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation. The 26-page document contains the NRC's conclusion "that the construction, operation, and decommissioning of the Diablo Canyon Installation will not result in significant impact to the environment," and therefore that "an [EIS] is not warranted for the proposed action, and pursuant to 10 C.F.R. [§] 51.31, a Finding of No Significant Impact is appropriate."

The EA is not devoid of discussion of terrorist attacks. Indeed, the document contains the Commission's response to a comment submitted by the California Energy Commission in response to an earlier draft that "there is no discussion in the EA of the potential destruction of the casks or blockage of air inlet ducts as the result of sabotage or a terrorist attack * * * [nor is there] a description of how decisions are being made regarding the configuration, design and spacing of the casks, the use of berms, and the location of the ISFSI to minimize the vulnerability of the ISFSI to potential attack." The NRC responded:

> In several recent cases, * * * the Commission has determined that an NRC environmental review is not the appropriate forum for the consideration of terrorist acts. The NRC staff considers the security of spent fuel as part of its safety review of each application for an ISFSI license. In addition to reviewing an ISFSI application against the

requirements of 10 CFR Part 72, the NRC staff evaluates the proposed security plans and facility design features to determine whether the requirements in 10 CFR Part 73, "Physical Protection of Plants and Materials," are met. The details of specific security measures for each facility are Safeguards Information, and as such, can not be released to the public.

The NRC has also initiated several actions to further ensure the safety of spent fuel in storage. Additional security measures have been put in place at nuclear facilities, including ISFSIs currently storing spent fuel. These measures include increased security patrols, augmented security forces and weapons, additional security posts, heightened coordination with law enforcement and military authorities, and additional limitations on vehicular access. Also, as part of its comprehensive review of its security program, the NRC is conducting several technical studies to assess potential vulnerabilities of spent fuel storage facilities to a spectrum of terrorist acts. The results of these studies will be used to determine if revisions to the current NRC security requirements are warranted.

Petitioners argue that, in denying their petitions, the NRC violated the AEA, the APA, and NEPA. Although we reject the AEA and APA claims, we agree with Petitioners that the agency has failed to comply with NEPA. We have jurisdiction over those final orders of the NRC made reviewable by 42 U.S.C. § 2239, which includes final orders entered in licensing proceedings, under 28 U.S.C. § 2342(4).

III

We turn first to Petitioners' AEA argument. Specifically, Petitioners argue that the NRC violated its regulations implementing the AEA, as well as the AEA's hearing

provisions, when it denied Petitioners a hearing on whether NEPA required consideration of the environmental impact of a terrorist attack on the Storage Installation; they also argue that the NRC violated the AEA's hearing provisions in denying Petitioners a hearing on post-September 11th security measures for the entire Diablo Canyon complex. Both of these challenges fail.

A

The NRC did not violate the AEA or its implementing regulations when it failed to explain its rejection of Petitioners' contentions by addressing each of their arguments. Nothing in the regulations or the AEA requires the NRC to provide such an explanation.

Section 189(a) of the AEA grants public hearing rights "upon the request of any person whose interest may be affected" by an NRC licensing proceeding. 42 U.S.C. § 2239. The NRC public hearing regulations, at 10 C.F.R. § 2.309, "promulgated pursuant to the AEC's[6] power to make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of" the AEA, 42 U.S.C. § 2201(p), specify the procedures required of both petitioners and the NRC in making and deciding hearing petitions.

Petitioners correctly observe that the NRC, in its decision, did not discuss whether Petitioners satisfied the regulatory standard. They are mistaken, however, in their unsupported contention that this omission amounts to the agency's failure to follow its own regulations and thus is "reversible error." The regulations simply do not require the

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[6] In 1974, Congress eliminated the Atomic Energy Commission ("AEC"). Regulatory functions went to the NRC, and promotional functions to the Energy Research and Development Administration. *See* Energy Reorganization Act of 1974, 42 U.S.C. § 5814.

NRC to explain its decisions in any particular manner. Although the NRC regulations are specific and demanding in what they require of petitioners, they demand far less of the NRC in responding to a petition: the regulations require only a timely "decision." *See* 10 C.F.R. § 2.714(i) ("Decision on request/petition. The presiding officer shall, within 45 days after the filing of answers and replies * * * issue a decision on each request for hearing/petition to intervene."). Because Petitioners do not claim that the NRC violated this requirement, we must reject this challenge.

B

The NRC's denial of a hearing on whether NEPA requires consideration of the environmental effects of a terrorist attack on the Storage Installation did not violate the AEA's hearing provisions.

Petitioners contend that the NRC relied on an improper ground in denying their request for a hearing on whether NEPA requires the Commission to consider the environmental impacts of terrorism — namely, the ground that it had determined in earlier decisions that NEPA imposes no such obligation. Thus, Petitioners do not challenge the substantive validity or coherence of those earlier opinions in making their AEA claim, but rather the reliance upon a prior determination of the merits in order to reject a petition presenting the same issues. As such, *Sierra Club v. NRC*, 862 F.2d 222 (9th Cir. 1988), on which Petitioners rely, does not apply. In that case, the NRC rejected the petitioners' contentions as lacking in reasonable specificity, and yet went on to analyze the merits of those supposedly unacceptable contentions. *Id.* at 228. Here, however, where the agency is rejecting the contentions as contrary to a prior decision, the "merits" and the reason for the inadmissibility of the contention collapse. Put differently, the NRC did not reach the merits of the petition as much as it assessed the issues raised against issues resolved by prior decisions. We hold that in doing so, the

Commission complied fully with the AEA. To hold otherwise would unduly restrict the agency's evaluation of hearing petitions, by requiring it to grant a hearing on issues it has already resolved whenever a petitioner claims to have new evidence. We can find, and Petitioners point to, nothing in the AEA that would require this result.

C

The NRC's denial of a hearing on security measures for Diablo Canyon as a whole also did not violate the AEA. Petitioners argue that the AEA requires the NRC to grant petitioners a hearing on all issues of material fact, including the security of the entire Diablo Canyon complex. Petitioners therefore conclude, citing *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir.1984), that the NRC violated the AEA when it denied a hearing on that issue.

Petitioners' argument misreads *Union of Concerned Scientists*, in which the D.C. Circuit held only that the agency cannot by rule presumptively eliminate a material issue from consideration in a hearing petition. *Union of Concerned Scientists* requires the agency to consider a petition, it does not require that the agency grant it.

The NRC in CLI 02-23 did not deny that security requirements for the entire complex might need to be upgraded, but rather maintained that a licensing proceeding hearing (and one regarding an installation, not the entire complex) was not the correct forum in which to address the issue. The Commission directed Petitioners to participate in a rulemaking or to raise their concerns in a hearing then pending before the Licensing Board. Petitioners contend that these alternative fora are illusory, and that rejection of their petition amounted to the denial of any opportunity to participate in the consideration of post-9/11 security measures for the Diablo Canyon complex.

Petitioners argue "[i]f the NRC were going to resolve Petitioners' concerns that grossly inadequate security made

the Diablo Canyon facility vulnerable to terrorist attacks generically, through a rulemaking, such a rulemaking would have been initiated as a result of the 'comprehensive security review' undertaken by the NRC." Thus, Petitioners argue that it would have been futile to submit a rulemaking petition. This argument must fail, as Petitioners did not use the available procedures for initiating a rulemaking. Petitioners cannot complain that NRC failed to institute a rulemaking they never requested.

Given that rulemaking may have been an avenue for Petitioners' participation, had they chosen to pursue it, their argument that they had no forum in which to raise their contentions loses its force. However, even were Petitioners correct in their assertion that they were unfairly denied the opportunity to participate in a rulemaking proceeding, the argument that the Licensing Board hearing was similarly illusory would fail. In fact, Petitioners were attempting to use the present Storage Installation licensing proceeding as a means of launching a much broader challenge to the Diablo Canyon complex. The NRC correctly observes that a petition alleging that existing NRC regulations are "grossly inadequate to protect against terrorist attack, and therefore must be supplemented by additional requirements" cannot in fact be raised before the Licensing Board, which cannot hear challenges to NRC rules. The limited scope of licensing proceedings does not, however, amount to the arbitrary denial of a forum, as Petitioners claim. While Petitioners could have raised site-specific issues "relating to the 'common defense and security'" that were not controlled by existing rules or regulations to the Licensing Board, they are not entitled to expand those proceedings to include the entire complex, and issues already covered by agency rules.

D

In short, the NRC did not violate the AEA in denying the petitions for a hearing. Neither the AEA nor its implementing regulations required the NRC to grant

Petitioners a hearing on whether NEPA required a consideration of the environmental impact of a terrorist attack on the Storage Installation or the security measures adopted for the entire Diablo Canyon complex.

IV

The NRC's reliance on its own prior opinions in its decision in this case does not violate the APA's notice and comment provisions. Petitioners argue that the decisions in CLI 03-01 and *PFS* amount to the announcement "of a general policy of refusing to consider the environmental impacts of terrorist attacks in Environmental Impact Statements." Petitioners rely on *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1014 (9th Cir. 1987) to claim that this policy depends on factual determinations not found subsequent to an evidentiary proceeding, and constitutes a "binding substantive norm," the promulgation of which, without a public hearing, violates the APA notice and comment provisions contained in 5 U.S.C. §§ 553(b), (c).[7] The flaw in Petitioners' argument is the mistaken assertion that the NRC's decisions were factual and not legal. If the NRC's conclusion that terrorism need not be examined under NEPA were factual, then Petitioners would be correct that its determination would have to comply with APA rulemaking requirements, including notice and comment, or else the agency would have to permit petitioners to challenge it in every proceeding where it was disputed.

That NEPA does not require consideration of the environmental impacts of terrorism is a legal, and not a

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[7] U.S.C. § 553(b) states that "[g]eneral notice of proposed rulemaking shall be published in the Federal Register," and outlines the requirements that such notice must meet. 5 U.S.C. § 553(c) states that after such notice has been given, "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation."

factual, conclusion. *Cf. Greenpeace Action v. Franklin*, 14 F.3d 1324, 1331 (9th Cir. 1993) (reasoning that a challenge to the adequacy of an EA turned on factual, not legal, principles where both NEPA's applicability and the requirements it imposed were uncontested); *see also Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995) (noting that although "challenges to agency actions which raise predominantly legal, rather than technical questions, are rare," the court was there required to address "just such a challenge"). Petitioners' analysis is therefore inapposite. The agency has the discretion to use adjudication to establish a binding legal norm. *See Sec. & Exch. Comm'n v. Chenery*, 332 U.S. 194, 199-203, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation, is one that lies primarily in the informed discretion of the administrative agency."). We therefore agree with the NRC's characterization in its brief to this court: having come to the legal conclusion that NEPA does not require consideration of the environmental consequences of terrorist attacks, "[w]hen petitioners in this case presented a proposed contention seeking an EIS that analyzed the impacts of possible terrorist acts at the proposed Diablo Canyon Installation, the NRC reasonably concluded that this request was sufficiently similar to the request in *PFS* to justify the application of that decision here."

V

Although we hold that the agency did not violate the APA when it relied on the prior resolution of a legal issue through adjudication, we come to a different conclusion as to that determination's compliance with NEPA. Because the issue whether NEPA requires consideration of the environmental impacts of a terrorist attack is primarily a legal one, we review the NRC's determination that it does not for reasonableness. *See Alaska Wilderness Recreation & Tourism Ass'n*, 67 F.3d at 727 (reviewing predominately legal

issue for reasonableness because "it makes sense to distinguish the strong level of deference we accord an agency in deciding factual or technical matters from that to be accorded in disputes involving predominately legal questions"); *Ka Makani'O Kohala Ohana, Inc. v. Water Supply,* 295 F.3d 955, 959 n. 3 (9th Cir.2002) ("Because this case involved primarily legal issues * * * based on undisputed historical facts, we conclude that the 'reasonableness' standard should apply to this case.").

Here, the NRC decided categorically that NEPA does not require consideration of the environmental effects of potential terrorist attacks. In making this determination, the NRC relied on *PFS,* where it "consider[ed] in some detail the legal question whether NEPA requires an inquiry into the threat of terrorism at nuclear facilities." 56 NRC 340, 343 (2002). In that case, intervenor State of Utah filed a contention claiming that the September 11 terrorist attacks "had materially changed the circumstances under which the Board had rejected previously proffered terrorism contentions by showing that a terrorist attack is both more likely and potentially more dangerous than previously thought." *Id.* at 345. The NRC concluded that even following the September 11th attacks, NEPA did not impose such a requirement, reasoning:

> In our view, an EIS is not an appropriate format to address the challenges of terrorism. The purpose of an EIS is to inform the decisionmaking authority and the public of a broad range of environmental impacts that will result, with a fair degree of likelihood, from a proposed project, rather than to speculate about 'worst-case' scenarios and how to prevent them.

Id. at 347.

The NRC determined that four grounds "cut[ ] against using the NEPA framework" to consider the environmental effects of a terrorist attack: (1) the possibility of a terrorist

attack is far too removed from the natural or expected consequences of agency action; (2) because the risk of a terrorist attack cannot be determined, the analysis is likely to be meaningless; (3) NEPA does not require a "worst-case" analysis; and (4) NEPA's public process is not an appropriate forum for sensitive security issues. *Id.* at 348. We review each of these four grounds for reasonableness, and conclude that these grounds, either individually or collectively, do not support the NRC's categorical refusal to consider the environmental effects of a terrorist attack.

A

The Commission relied first on finding that the possibility of a terrorist attack is too far removed from the natural or expected consequences of agency action. *Id.* at 347. Section 102 of NEPA requires federal agencies to prepare "a detailed statement * * * on the environmental impact" of any proposed major federal action "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(1)(C)(i). The question thus becomes whether a given action "significantly affects" the environment.

The NRC claims that the appropriate analysis of Section 102 is that employed by the Supreme Court in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773, 103 S.Ct. 1556, 75 L.Ed.2d 534 (1983). In *Metropolitan Edison*, the Court noted that "[t]o determine whether Section 102 requires consideration of a particular effect, we must look to the relationship between that effect and the change in the physical environment caused by the major federal action at issue," looking for "a reasonably close causal relationship * * * like the familiar doctrine of proximate cause from tort law." 460 U.S. at 774, 103 S.Ct. 1556. The Commission claims that its conclusion that the environmental impacts of a possible terrorist attack on an NRC-licensed facility is beyond a "reasonably close causal relationship" was a reasonable application of this "proximate cause" analogy.

The problem with the agency's argument, however, is that *Metropolitan Edison* and its proximate cause analogy are inapplicable here. In *Metropolitan Edison,* the petitioners argued that NEPA required the NRC to consider the potential risk of psychological damage upon reopening the Three Mile Island nuclear facilities to those in the vicinity. Noting that NEPA is an environmental statute, the Supreme Court held that the essential analysis must focus on the "closeness of the relationship between the change in the environment and the 'effect' at issue." 460 U.S. at 772, 103 S.Ct. 1556.

The appropriate analysis is instead that developed by this court in *No GWEN Alliance v. Aldridge,* 855 F.2d 1380 (9th Cir. 1988). In *No GWEN,* the plaintiffs argued that NEPA required the Air Force to consider the threat of nuclear war in the implementation of the Ground Wave Emergency Network ("GWEN"). We held "that the nexus between construction of GWEN and nuclear war is too attenuated to require discussion of the environmental impacts of nuclear war in an [EA] or [EIS]." 855 F.2d at 1386.

The events at issue here, as well as in *Metropolitan Edison* and *No GWEN,* form a chain of three events: (1) a major federal action; (2) a change in the physical environment; and (3) an effect. *Metropolitan Edison* was concerned with the relationship between events 2 and 3 (the change in the physical environment, or increased risk of accident resulting from the renewed operation of a nuclear reactor, and the effect, or the decline in the psychological health of the human population). The Court in *Metropolitan Edison* explicitly distinguished the case where the disputed relationship is between events 1 and 2: "we emphasize that in this case we are considering effects caused by the risk of accident. The situation where an agency is asked to consider effects that will occur if a risk is realized, for example, if an accident occurs * * * is an entirely different case." *Id.* at 775 n. 9, 103 S.Ct. 1556. In *No GWEN,* we followed the Court's

admonition and, in addressing the relationship between events 1 and 2, we held that the *Metropolitan Edison* analysis did not apply "because it discusse[d] a different type of causation than that at issue in this case * * * [which] require[d] us to examine the relationship between the agency action and a potential impact on the environment." *Id.* at 1386. *No GWEN* relied on our decision in *Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017, 1026 (9th Cir.1980), which held that "an impact statement need not discuss remote and highly speculative consequences." Applying that standard to the plaintiffs' claims that the military GWEN system's installation would "increase the probability of nuclear war," and "that GWEN would be a primary target in a nuclear war," we held both propositions to be "remote and highly speculative," and, therefore, NEPA did not require their consideration.

In the present case, as in *No GWEN,* the disputed relationship is between events 1 and 2 (the federal act, or the licensing of the Storage Installation, and the change in the physical environment, or the terrorist attack). The appropriate inquiry is therefore whether such attacks are so "remote and highly speculative" that NEPA's mandate does not include consideration of their potential environmental effects.

The NRC responds by simply declaring without support that, as a matter of law, "the possibility of a terrorist attack * * * is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA." 56 NRC at 349. In doing so, the NRC failed to address Petitioners' factual contentions that licensing the Storage Installation would lead to or increase the risk of a terrorist attack because (1) the presence of the Storage Installation would increase the probability of a terrorist attack on the Diablo Canyon nuclear facility, and (2) the Storage Installation itself would be a primary target for a terrorist attack. We conclude that it was unreasonable for

the NRC to categorically dismiss the possibility of terrorist attack on the Storage Installation and on the entire Diablo Canyon facility as too "remote and highly speculative" to warrant consideration under NEPA.

In so concluding, we also recognize that the NRC's position that terrorist attacks are "remote and highly speculative," as a matter of law, is inconsistent with the government's efforts and expenditures to combat this type of terrorist attack against nuclear facilities. In the *PFS* opinion, the NRC emphasized the agency's own post-September 11th efforts against the threat of terrorism:

> At the outset, however, we stress our determination, in the wake of the horrific September 11th terrorist attacks, to strengthen security at facilities we regulate. We currently are engaged in a comprehensive review of our security regulations and programs, acting under our AEA-rooted duty to protect "public health and safety" and the "common defense and security." We are reexamining, and in many cases have already improved, security and safeguards matters such as guard force size, physical security exercises, clearance requirements and background investigations for key employees, and fitness-for-duty requirements. More broadly, we are rethinking the NRC's threat assessment framework and design basis threat. We also are reviewing our own infrastructure, resources, and communications.
>
> Our comprehensive review may also yield permanent rule or policy changes that will apply to the proposed PFS facility and to other NRC-related facilities. The review process is ongoing and cumulative. It has already resulted in a number of security-related actions to address terrorism threats at both active and defunct nuclear facilities.

56 NRC at 343. Among these actions is the establishment of an Office of Nuclear Security and Incident Response, "responsible for immediate operational security and safeguards issues as well as for long-term policy development[,] work[ing] closely with law enforcement agencies and the Office of Homeland Security[,] * * * coordinat[ing] the NRC's ongoing comprehensive security review." *Id.* at 344-45.

We find it difficult to reconcile the Commission's conclusion that, as a matter of law, the possibility of a terrorist attack on a nuclear facility is "remote and speculative," with its stated efforts to undertake a "top to bottom" security review against this same threat. Under the NRC's own formulation of the rule of reasonableness, it is required to make determinations that are consistent with its policy statements and procedures. Here, it appears as though the NRC is attempting, as a matter of policy, to insist on its preparedness and the seriousness with which it is responding to the post-September 11th terrorist threat, while concluding, as a matter of law, that all terrorist threats are "remote and highly speculative" for NEPA purposes.[8]

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[8] The view that a terrorist attack is too speculative to be a required part of NEPA review would seem to be inconsistent with the NRC's pre-9/11 security procedures. Since 1977, the NRC has required licensed plants to have a security plan that is designed to protect against a "design basis threat" for radiological sabotage. *See* General Accounting Office, *Nuclear Regulatory Commission: Oversight of Security at Commercial Nuclear Power Plants Needs to be Strengthened,* GAO-030752 (2003) at 6. "The design basis threat characterizes the elements of a postulated attack, including the number of attackers, their training, and the weapons and tactics they are capable of using." *Id.*

Thus, the NRC — even before the terrorist attacks of 9/11 — did not consider such attacks too "remote and speculative" to be considered in agency planning. To the contrary, the agency has long required analysis of means and methods of hypothetical

In sum, in considering the policy goals of NEPA and the rule of reasonableness that governs its application, the possibility of terrorist attack is not so "remote and highly speculative" as to be beyond NEPA's requirements.

B

The NRC's reliance upon the second *PFS* factor, that the Risk of a Terrorist Attack Cannot be Adequately Determined, 56 NRC at 350, is also not reasonable. First, the NRC's dismissal of the risk of terrorist attacks as "unquantifiable" misses the point. The numeric probability of a specific attack is not required in order to assess likely modes of attack, weapons, and vulnerabilities of a facility, and the possible impact of each of these on the physical environment, including the assessment of various release scenarios. Indeed, this is precisely what the NRC already analyzes in different contexts. It is therefore possible to conduct a low probability-high consequence analysis without quantifying the precise probability of risk. The NRC itself has recognized that consideration of uncertain risks may take a form other than quantitative "probabilistic" assessment. In its "Proposed Policy Statement on Severe Accidents and Related Views on Nuclear Reactor Regulation," 48 Fed. Reg. 16,014 (1983), the Commission stated that:

> In addressing potential accident initiators (including earthquakes, sabotage, and multiple human errors) where empirical data are limited and *residual uncertainty is large,* the use of conceptual modeling and scenario assumptions in Safety Analysis Reports will be helpful. They should be based on *the best qualified judgments of experts,* either in the form of subjective numerical probability estimates *or*

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attacks against specific facilities, with the goal of establishing effective counter-measures.

> *qualitative assessments of initiating events and casual [sic] linkages in accident sequences.*

48 Fed. Reg. at 16,020 (emphasis added).

No provision of NEPA, or any other authority cited by the Commission, allows the NRC to eliminate a possible environmental consequence from analysis by labeling the risk as "unquantifiable." *See Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 754 (3rd Cir.1989) (J. Scirica, dissenting) (finding no "statutory provision, no NRC regulation or policy statement, and no case law that permits the NRC to ignore any risk found to be unquantifiable"). If the risk of a terrorist attack is not insignificant, then NEPA obligates the NRC to take a "hard look" at the environmental consequences of that risk. The NRC's actions in other contexts reveal that the agency does not view the risk of terrorist attacks to be insignificant. Precise quantification is therefore beside the point.

Even if we accept the agency's argument, the agency fails to adequately show that the risk of a terrorist act is unquantifiable. The agency merely offers the following analysis as to the quantifiability of a potential terrorist attack:

> The horrors of September 11 notwithstanding, it remains true that the likelihood of a terrorist attack being directed at a particular nuclear facility is not quantifiable. Any attempt at quantification or even qualitative assessment would be highly speculative. In fact, the likelihood of attack cannot be ascertained with confidence by any state-of-the-art methodology. That being the case, we have no means to assess, usefully, the risks of terrorism at the PFS facility.

56 NRC at 350. The agency nonetheless has simultaneously shown the ability to conduct a "top to bottom" terrorism review. This leaves the Commission in the tenuous position of insisting on the impossibility of a meaningful, i.e.

quantifiable, assessment of terrorist attacks, while claiming to have undertaken precisely such an assessment in other contexts. Further, as we have noted, the NRC has required site-specific analysis of such threats, involving numerous recognized scenarios.[9]

Thus, we conclude that precise quantification of a risk is not necessary to trigger NEPA's requirements, and even if it were, the NRC has not established that the risk of a terrorist attack is unquantifiable.

C

The NRC's third ground, that it is not required to conduct a "worst-case" analysis, is a non sequitur. Although it is a true statement of the law, the agency errs in equating an assessment of the environmental impact of terrorist attack with a demand for a worst-case analysis.

The Council on Environmental Quality ("CEQ") regulations, 40 C.F.R. §§ 1500.1-1518.4, promulgated with the "purpose [of] tell[ing] federal agencies what they must do to comply with [NEPA] procedures and achieve the goals of [NEPA]," have been interpreted by the Supreme Court as "entitled to substantial deference." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355, 109 S.Ct. 1835, 104 L.Ed.2d 351 (citing *Andrus v. Sierra Club*, 442 U.S. 347, 358, 99 S.Ct. 2335, 60 L.Ed.2d 943 (1979)). These regulations mandated worst-case analyses until 1986, when CEQ replaced the former 40 C.F.R. § 1502.22, requiring an agency, when relevant information was either unavailable or too costly to obtain, to include in the EIS a "worst-case analysis

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[9] The NRC's assertion that a risk of terrorism cannot be quantified is also belied by the very existence of the Department of Homeland Security Advisory System, which provides a general assessment of the risk of terrorist attacks. *See, e.g.*, World Market Research Centre, Global Terrorism Index 2003/4 (offering a probabilistic risk assessment of terrorist activities over a 12-month period).

and an indication of the probability or improbability of its occurrence," with the new and current version of the regulation, which requires an agency to instead deal with uncertainties by including within the EIS "a summary of existing credible scientific evidence which is relevant to evaluating the reasonable foreseeable significant adverse impacts on the human environment, and * * * the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community." 40 C.F.R. §§ 1502.22(b)(3), (4). The current requirement applies to those events with potentially catastrophic consequences "even if their probability of occurrence is low, provided that the analysis of impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." 40 C.F.R. § 1502.22(b)(4). The Supreme Court held in *Robertson* that the amendment of the regulations had nullified the worst-case analysis requirement. 490 U.S. at 355, 109 S.Ct. 1835; *Edwardsen v. U.S. Dep't of Interior*, 268 F.3d 781, 785 (9th Cir. 2001).

The Commission is therefore correct when it argues that NEPA does not require a worst-case analysis. It is mistaken, however, when it claims that "Petitioners' request for an analysis of [the environmental effects of] a successful terrorist attack at the Diablo Canyon ISFSI approximates a request for a 'worst-case' analysis that has long since been discarded by the CEQ regulations * * * and discredited by the Federal courts." According to the NRC, "[m]aking the various assumptions required by [P]etitioners' scenario requires the NRC to venture into the realm of 'pure conjecture.'" We disagree.

An indication of what CEQ envisioned when it imposed the worst-case analysis requirement can be gleaned from a 1981 CEQ memorandum, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, reprinted at 46 FR 18026-01 (March 23, 1981).

CEQ answered one of those questions, "[w]hat is the purpose of a worst-case analysis? How is it formulated and what is the scope of the analysis?" with the following:

> The purpose of the analysis is to * * * cause agencies to consider th[ ]e potential consequences [of agency decisions] when acting on the basis of scientific uncertainties or gaps in available information. The analysis is formulated on the basis of available information, using reasonable projections of the worst possible consequences of a proposed action.
>
> For example, if there are scientific uncertainty and gaps in the available information concerning the numbers of juvenile fish that would be entrained in a cooling water facility, the responsible agency must disclose and consider the possibility of the loss of the commercial or sport fishery. In addition to an analysis of a low probability/catastrophic impact event, the worst-case analysis should also include a spectrum of events of higher probability but less drastic impact.

46 FR 18026, 18032. While it is true that the agency is not required to consider consequences that are "speculative,"[10] the NRC's argument wrongly labels a terrorist attack the worst-case scenario because of the low or indeterminate probability of such an attack. The CEQ memo, by including

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[10] Because we disagree with the agency's interpretation of worst-case analysis, we do not reach the agency's characterization of the possibility of terrorist attack as "speculative." We note, however, that this characterization stands out as contrary to the vigilant stance that Americans are encouraged to take by the Department of Homeland Security. *See* www.dhs.gov/dhspublic/display?theme=29 (urging that "[a]ll Americans should continue to be vigilant" and noting that "[t]he country remains at an elevated risk * * * for terrorist attack.")

as worst-case scenarios events of both higher and lower probability, reveals that worst-case analysis is not defined solely by the low probability of the occurrence of the events analyzed, but also by the range of outcomes of those events. *See also Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1260 (10th Cir. 2003) (citing a witness's testimony that the loss of bald eagle nesting sites was both "likely" and "a worst-case scenario"). Petitioners do not seek to require the NRC to analyze the most extreme (i.e., the "worst") possible environmental impacts of a terrorist attack. Instead, they seek an analysis of the range of environmental impacts likely to result in the event of a terrorist attack on the Storage Installation. We reject the Commission's characterization of this request as a demand for a worst-case analysis.

D

The NRC's reliance on the fourth *PFS* factor, that it cannot comply with its NEPA mandate because of security risks, is also unreasonable. There is no support for the use of security concerns as an excuse from NEPA's requirements. While it is true, as the agency claims, that NEPA's requirements are not absolute, and are to be implemented consistent with other programs and requirements, this has never been interpreted by the Supreme Court as excusing NEPA's application to a particularly sensitive issue. *See Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 102 S.Ct. 197, 70 L.Ed.2d 298 (1981) (holding that the Navy was required to perform a NEPA review and to factor its results into decisionmaking even where the sensitivity of the information involved meant that the NEPA results could not be publicized or adjudicated). *Weinberger* can support only the proposition that security considerations may permit or require modification of some of the NEPA procedures, not the Commission's argument that sensitive security issues result in some kind of NEPA waiver.

The application of NEPA's requirements, under the rule of reason relied on by the NRC, is to be considered in light of

the two purposes of the statute: first, ensuring that the agency will have and will consider detailed information concerning significant environmental impacts; and, second, ensuring that the public can both contribute to that body of information, and can access the information that is made public. *Pub. Citizen*, 541 U.S. at 768, 124 S.Ct. 2204. To the extent that, as the NRC argues, certain information cannot be publicized, as in *Weinberger*, other statutory purposes continue to mandate NEPA's application. For example, that the public cannot access the resulting information does not explain the NRC's determination to prevent the public from *contributing* information to the decisionmaking process. The NRC simply does not explain its unwillingness to hear and consider the information that Petitioners seek to contribute to the process, which would fulfill both the information-gathering and the public participation functions of NEPA. These arguments explain why a *Weinberger*-style limited proceeding might be appropriate, but cannot support the NRC's conclusion that NEPA does not apply. As we stated in *No GWEN*: "There is no 'national defense' exception to NEPA * * * 'The Navy, just like any federal agency, must carry out its NEPA mandate to the fullest extent possible and this mandate includes weighing the environmental costs of the [project] even though the project has serious security implications.'" 855 F.2d at 1384 (quoting *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1977)).

E

In sum, none of the four factors upon which the NRC relies to eschew consideration of the environmental effects of a terrorist attack satisfies the standard of reasonableness. We must therefore grant the petition in part and remand for the agency to fulfill its responsibilities under NEPA.

Our identification of the inadequacies in the agency's NEPA analysis should not be construed as constraining the NRC's consideration of the merits on remand, or circumscribing the procedures that the NRC must employ in

conducting its analysis. There remain open to the agency a wide variety of actions it may take on remand, consistent with its statutory and regulatory requirements. We do not prejudge those alternatives. Nor do we prejudge the merits of the inquiry. We hold only that the NRC's stated reasons for categorically refusing to consider the possibility of terrorist attacks cannot withstand appellate review based on the record before us.

We are also mindful that the issues raised by the petition may involve questions of national security, requiring sensitive treatment on remand. However, the NRC has dealt with our nation's most sensitive nuclear secrets for many decades, and is well-suited to analyze the questions raised by the petition in an appropriate manner consistent with national security.

VI

We deny the petition as to the claims under the AEA and the APA. However, because we conclude that the NRC's determination that NEPA does not require a consideration of the environmental impact of terrorist attacks does not satisfy reasonableness review, we hold that the EA prepared in reliance on that determination is inadequate and fails to comply with NEPA's mandate. We grant the petition as to that issue and remand for further proceedings consistent with this opinion.

PETITION GRANTED IN PART; DENIED IN PART; REMANDED.

APPENDIX B

CLI-03-1

Cite as 57 NRC 1 (2003)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of **Docket No. 72-26-ISFSI**

PACIFIC GAS AND ELECTRIC COMPANY
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)

January 23, 2003

MEMORANDUM AND ORDER

The Licensing Board, in a recent ruling on standing, admissibility of contentions, and admission of interested governmental entities in this independent spent fuel storage installation ("ISFSI") licensing proceeding, referred its decision on one environmental contention and portions of three other contentions to the Commission.[1] We accept the Board's referral and affirm its rejection of the contentions.

I. BACKGROUND

Pacific Gas & Electric Company ("PG&E") filed an application on December 21, 2001, for a materials license

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[1] *See* LBP-02-23, 56 NRC 413 (2002).

authorizing construction and operation of a dry storage cask ISFSI to be located at its Diablo Canyon Nuclear Power Plant ("DCPP") site. In response to a notice of opportunity for hearing, the Secretary of the Commission received petitions to intervene from numerous petitioners.[2] The San Luis Obispo Mothers for Peace, acting as Lead Petitioner, submitted five technical and three environmental contentions. The County of San Luis Obispo ("County"), previously granted governmental participant status, submitted one environmental and two technical issues.[3] The Board heard oral argument on the issues of standing of the Petitioners and admissibility of their contentions on September 10-11, 2002. In addition to the Lead Petitioner, the Board found that the Santa Lucia Chapter of the Sierra Club, San Luis Obispo Cancer Action Now, Peg Pinard, the Avila Valley Advisory Council, and the Central Coast Peace and Environmental Council have standing.[4] We shall refer to the

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[2] In addition, five entities sought leave to participate as interested governmental entities pursuant to 10 C.F.R. § 2.715(c): "The presiding officer will afford representatives of an interested State, county, municipality, Federally-recognized Indian Tribe, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue." Of the five requests, only that of the County of San Luis Obispo is relevant to today's decision.

[3] *See* unpublished Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation) (Aug. 7, 2002). The Board also granted governmental participant status to the Port San Luis Harbor District. *See id.*

[4] The Board also determined that the following groups had not demonstrated standing: the Environmental Center of San Luis Obispo, Cambria Legal Defense Fund, Santa Margarita Area Residents Together, San Luis Obispo Chapter of Grandmothers for Peace International, Nuclear Age Peace Foundation, and the Ventura County Chapter of the Surfrider Foundation.

admitted Intervenors collectively as "SLOMFP." The Board granted governmental participant status to the California Energy Commission and the Avila Beach Community Services District, but denied the request of the Diablo Canyon Independent Safety Committee.

The Board admitted one of SLOMFP's five technical contentions for litigation in this proceeding and rejected SLOMFP's three environmental contentions. In accordance with 10 C.F.R. § 2.730(f), the Board referred its rulings regarding the sabotage and terrorism aspects of SLOMFP's three environmental contentions and San Luis Obispo County's environmental issue to the Commission for further consideration and action as appropriate.[5] We accept the Board's referral and affirm the Board's denial of admission of the contentions, albeit for different reasons than those the Board expressed.

II. DISCUSSION

A. The Referred Terrorism Issues[6]

SLOMFP's three environmental contentions address, at varying levels of prominence, the threat of terrorism. Contention EC-1, the primary terrorism contention, states: "The Environmental Report's discussion of environmental impacts is inadequate because it does not include the consequences of destructive acts of malice or insanity against

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[5] *See* LBP-02-23, 56 NRC at 462. *See also* 10 C.F.R. § 2.730(f): "When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission * * *."

[6] We recently denied the direct request of the San Luis Obispo Mothers for Peace and several other petitioners to suspend this proceeding pending completion of the Commission's comprehensive review of measures to protect against terrorist attack. *See* CLI-02-23, 56 NRC 230 (2002).

the proposed ISFSI."[7] SLOMFP believes that PG&E's environmental report should evaluate a range of alternatives to the proposed ISFSI, including dispersal of casks, protection of casks by berms or bunkers, and use of more robust storage casks.

The Board found the contention inadmissible because it "directly challenge[s] the Commission's rules regarding destructive acts of malice or insanity by enemies of the United States * * *. [C]ontentions that question existing NRC regulations are inadmissible as a matter of law."[8] Thus, the Board relied in part on 10 C.F.R. § 2.758(a), which prohibits adjudicatory challenges to NRC rules,[9] and in part on 10 C.F.R. § 50.13, which provides that an applicant for a license to construct and operate a production or utilization facility "is not required to provide for design features or other measures for the specific purpose of protection against the effects of * * * attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person."[10]

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[7] "Supplemental Request for Hearing and Petition To Intervene by [SLOMFP]" at 24 (July 18, 2002).

[8] LBP-02-23, 56 NRC at 448.

[9] "[A]ny rule or regulation of the Commission, or any provision thereof * * * is not subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding involving initial or renewal licensing * * *." 10 C.F.R. § 2.758(a).

[10] 10 C.F.R. § 50.13. Although section 50.13 does not, on its face, apply to an ISFSI, an applicant for an ISFSI must describe physical security protection plans, which must meet the requirements set forth in 10 C.F.R. § 73.51. Adopting section 73.51 in 1998, the Commission specifically rejected a requirement that ISFSIs be protected against malevolent attacks by land-based or airborne vehicles. *See* Final Rule: "Physical Protection for Spent Nuclear

Because EC-1 is an environmental contention based on the National Environmental Policy Act ("NEPA")[11] rather than a safety contention, SLOMFP argued that 10 C.F.R. § 2.758 is not applicable. The Board, however, reasoned that "the rationale for 10 C.F.R. § 50.13 [is] as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities."[12] The Board thus found contention EC-1 inadmissible, but referred its ruling to the Commission.[13]

Fuel and High-Level Radioactive Waste," 63 Fed. Reg. 26,955, 26,956 (May 15, 1998).

[11] *See* 42 U.S.C. §§ 4321 *et seq.*

[12] LBP-02-23, 56 NRC at 448, quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973) and citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476, 487 (2001), *referral accepted,* CLI-02-3, 55 NRC 155 (2002).

[13] *See* LBP-02-23, 56 NRC at 448. In making the referral, the Board alluded to the Commission's ongoing comprehensive review of NRC's safeguards and physical security programs in the wake of the Sept. 11, 2001 terrorist attacks. Moreover, the Commission, at the time of the Board's referral, was considering terrorism contentions we had agreed to review in four other cases. *See Private Fuel Storage,* LBP-01-37, 54 NRC 476 (denying admission of terrorism contention and referring issue to the Commission), *referral accepted,* CLI-02-3, 55 NRC 155; *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station Units 1 and 2), LBP-02-4, 55 NRC 49 (2002) (certifying terrorism issue to the Commission), *certification accepted,* CLI-02-6, 55 NRC 164 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403 (2001), *reconsideration denied,* unpublished Memorandum and Order (Jan. 16, 2002), *petition for Commission review granted in part,* CLI-02-4, 55 NRC 158 (2002); and *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131 (2002) (denying admission of terrorism contention and referring contention to the Commission), *referral accepted,* CLI-02-5, 55 NRC 161 (2002).

Contention EC-2 asserts that PG&E has failed to fully describe the purposes of the proposed ISFSI or to evaluate all reasonably associated environmental impacts and alternatives. SLOMFP's focus in this contention is its allegation that PG&E might have an unstated purpose for the proposed ISFSI; *i.e.*, to provide spent fuel storage capacity during a license renewal term for the Diablo Canyon units. The Board found the contention inadmissible, but noted that, in several of the contention's bases, SLOMFP repeated arguments concerning acts of destruction or sabotage that were discussed in support of EC-1. Therefore, the Board referred its ruling on admissibility of contention EC-2 to the Commission "to the extent destruction and sabotage matters are proffered in support of admission."[14]

In Contention EC-3, SLOMFP asserts that PG&E has failed to evaluate the environmental impacts of transporting fuel away from the proposed ISFSI at the end of its license term. SLOMFP claims that the ER must consider impacts of such transportation, including sabotage and terrorist attacks against transportation casks. The Board rejected contention EC-3 but, as with EC-2, referred its ruling to the Commission "to the extent terrorism and sabotage matters are proffered in support of its admission."[15]

Similar to SLOMFP's EC-1, the County's environmental issue asserted that the environmental report does not contain an adequate analysis of alternatives. Specifically, in its subissue regarding alternative sites and associated security measures, the County argues that PG&E did not consider vulnerability to offshore attacks when it selected the site for the proposed ISFSI. Because this subissue "appears to challenge the Commission's rules regarding acts of destruction and sabotage," the Board denied it as a matter of

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[14] LBP-02-23, 56 NRC at 451.

[15] *Id.* at 453.

law, but made the terrorism aspects of the issue part of its referral to the Commission.[16]

B. The Commission's Ruling

We accept the Board's referral of the terrorism issues in SLOMFP's three environmental contentions and the County's environmental subissue and affirm the result the Board reached.

We recently decided similar issues in four other cases in four different contexts: *Private Fuel Storage* (a dry cask independent spent fuel storage installation), *Savannah River* (a mixed oxide fuel fabrication facility), *Millstone* (expansion of the spent fuel storage pool capacity at a commercial reactor site), and *McGuire/Catawba* (license renewal for four commercial reactors).[17] In each of these settings, we considered whether NEPA requires the NRC, in rendering licensing decisions, to consider the impacts of terrorism. We held that NEPA does not require a terrorism review, and that an environmental impact statement is not the appropriate format in which to address the challenges of terrorism.

In the lead *Private Fuel Storage* case, involving a large away-from-reactor ISFSI, we detailed four principal reasons for our holding. First, the "possibility of a terrorist attack * * * is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA," which is confined to "manageable"

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[16] *See id.* at 460.

[17] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002); and *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002).

inquiries.[18] Second, the risk of a terrorist attack at a nuclear facility cannot be adequately determined.[19] As a practical matter, attempts to evaluate that risk even in qualitative terms are likely to be meaningless and consequently of no use in the agency's decisionmaking. Third, NEPA does not require a "worst-case" analysis, which "'creates a distorted picture of a project's impacts and wastes agency resources."[20] Lastly, NEPA's public process is not an appropriate forum for considering sensitive security issues. In this regard we noted, "NEPA does not override [our] concern for making sure that sensitive security-related information ends up in as few hands as practicable."[21] For the same reasons, we affirm the Board's rejection of SLOMFP's contention EC-1, the terrorism-related portions of contentions EC-2 and EC-3, and the County's environmental issue.[22]

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[18] *See Private Fuel Storage*, CLI-02-25, 56 NRC at 349 & n.33, citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983).

[19] *See Private Fuel Storage*, CLI-02-25, 56 NRC at 350-51, and references cited therein.

[20] *See id.* at 352; *see generally id.* at 351-54, and references cited therein.

[21] *Id.* at 355; *see id.* at 354-57, and references cited therein.

[22] We need not decide the applicability of the rationale for 10 C.F.R. § 50.13 to the Commission's NEPA responsibilities. We note that "[t]he provision grew out of a policy judgment by the Atomic Energy Commission that it was our nation's 'settled tradition' to 'look[] to the military' for defense against enemy attacks, and that it was 'impracticable' to expect a 'civilian industry' to provide the necessary defense." *Millstone*, CLI-02-27, 56 NRC at 369 n.7 (quoting *Siegel v. AEC*, 400 F.2d 778, 782 (D.C. Cir. 1968)). As in *Private Fuel Storage, Savannah River, Millstone*, and *McGuire/Catawba*, our decision today "rest[s] on general principles regarding the scope of NEPA, [and] we do not reach the application of section 50.13 as applied to the terrorism contentions that are raised in [this] case." *Millstone* at 369, n.7.

Our decision today rests entirely on our understanding of NEPA and of what means are best suited to dealing with terrorism. Nonetheless, our conclusion comports with the practical realities of spent fuel storage and the congressional policy to encourage utilities to provide for spent fuel storage at reactor sites pending construction of a permanent repository.[23] Storage of spent fuel at commercial reactor sites offers no unusual technological challenges. Indeed, it has been occurring at Diablo Canyon for many years and will continue whether or not we license the proposed ISFSI.[24]

Although we decline to consider terrorism in the context of NEPA, the Commission is devoting substantial time and agency resources to combating the potential for terrorism involving nuclear facilities and materials. The NRC Staff is conducting a comprehensive review of our security and safeguards measures, including measures concerning interim spent fuel storage at power reactor sites. We have also instituted interim upgrades in security requirements for our licensees, and we are working with numerous other government agencies to meet and minimize the threat of terrorism.

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[23] *See* Nuclear Waste Policy Act, 42 U.S.C. §§ 10131 *et seq.*; *Millstone*, CLI-02-27, 56 NRC at 371.

[24] *See Millstone*, CLI-02-27, 56 NRC at 371. *Cf. McGuire/Catawba*, CLI-02-26, 56 NRC at 365 ("Particularly in the case of a license renewal application, where reactor operation will continue for many years regardless of the Commission's ultimate decision, it is sensible not to devote resources to the likely impact of terrorism during the license renewal period, but instead to concentrate on how to prevent a terrorist attack in the near term at the already licensed facilities"); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 343 (2002) (terrorist attacks are neither caused by nor result from the proposed license transfers).

III. CONCLUSION

We *accept* the Board's referral of the terrorism aspects of four environmental contentions and issues and *affirm* the Board's decision to reject consideration of the terrorism issues presented in this proceeding.

IT IS SO ORDERED.

For the Commission[25]

ANNETTE L. VIETTI-COOK

Secretary of the Commission

Dated at Rockville, Maryland,

this 23d day of January 2003

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[25] Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

APPENDIX C

CLI-02-25

Cite as 56 NRC 340 (2002)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of Docket **No. 72-22-ISFSI**
PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation) **December 18, 2002**

MEMORANDUM AND ORDER

On December 13, 2001, the Atomic Safety and Licensing Board referred to the Commission its decision denying admission of a late-filed contention of the State of Utah. Utah's contention related to the threat of a terrorist attack on Private Fuel Storage, L.L.C.'s (PFS) proposed independent spent fuel storage installation (ISFSI).[1] We subsequently accepted review,[2] and also agreed to review three other cases

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[1] LBP-01-37, 54 NRC 476 (2001).

[2] CLI-02-3, 55 NRC 155 (2002). The Commission accepted review of the question whether either the Atomic Energy Act (AEA) or the National Environmental Policy Act (NEPA) requires the NRC to consider the risk of terrorism in a licensing proceeding. The Commission declined to review the Board's ruling that Utah's proffered contention met our late-filing criteria. Utah subsequently

raising terrorism-related issues.[3] The primary question in these cases is whether NEPA requires the NRC, in rendering licensing decisions, to consider the impacts of terrorism. We hold today that NEPA does not require a terrorism review.[4]

I. BACKGROUND

A. Overview

Below we consider in some detail the legal question whether NEPA requires an inquiry into the threat of terrorism at nuclear facilities. At the outset, however, we stress our determination, in the wake of the horrific September 11th terrorist attacks, to strengthen security at facilities we regulate. We currently are engaged in a comprehensive review of our security regulations and programs, acting under our AEA-rooted duty to protect "public health and safety" and the "common defense and security."[5] We are reexamining, and in many cases have

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dropped its AEA claim, leaving only its NEPA claim for our review.

[3] *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-4, 55 NRC 158 (2002) (granting petition for review); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-6, 55 NRC 164 (2002) (accepting certified question); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-5, 55 NRC 161 (2002) (accepting referred ruling).

[4] We reach the same conclusion in the other three companion cases. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002); and *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002).

[5] *See, e.g.*, AEA §§ 103(b) & (d), 104(d), 161(b), 182a, 189a(1)(B)(ii) & (iii), 42 U.S.C. §§ 2133(b) & (d), 2134(d), 2201(b), 2232(a), 2239(a)(1)(B)(ii) & (iii). *See also Florida Power & Light Co.* (Turkey

already improved, security and safeguards matters such as guard force size, physical barriers, access control, detection systems, alarm stations, response strategies, security exercises, clearance requirements and background investigations for key employees, and fitness-for-duty requirements. More broadly, we are rethinking the NRC's threat assessment framework and design basis threat. We also are reviewing our own infrastructure, resources, and communications.

Our comprehensive review may also yield permanent rule or policy changes that will apply to the proposed PFS facility and to other NRC-regulated facilities. The review process is ongoing and cumulative. It already has resulted in a number of security-related actions to address terrorism threats at both active and defunct nuclear facilities.

For instance, just after the September 11th terrorist attacks, we issued Threat Advisories to all licensees of nuclear power plants, nonpower reactors, nuclear fuel facilities, gaseous diffusion plants, and decommissioning reactors. The Advisories indicated that these facilities should go to the highest level of security. As a result of our initial Advisories, nuclear power plant licensees increased patrols, augmented security forces and capabilities, added security posts, installed additional physical barriers, increased the standoff distance for vehicle checks,[6] enhanced coordination with law enforcement and military authorities, and imposed more restrictive site access controls for all personnel. We

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Point Nuclear Generating Plant, Units 3 and 4), 4 AEC 9, 12 (Commission 1967) (these two statutory phrases "are fundamental to a delineation of the Commission's licensing authority and responsibility for [nuclear power plant] facilities"), *aff'd sub nom. Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968).

[6] The standoff distance between a barrier and the nuclear plant is the distance between vital plant equipment and the closest exterior point of the vehicle barrier system.

continue to provide updates to the licensees regarding our original Threat Advisories, having so far issued more than thirty such updates. NRC security specialists have performed numerous onsite physical security vulnerability assessments at licensed facilities to evaluate the effectiveness of our licensees' enhanced security measures.

On February 25, 2002, after further security reviews, we took the additional step of issuing orders to all 104 power reactor licensees requiring them to take interim compensatory security measures over and above those required by our regulations. The orders formalized steps that those licensees had voluntarily taken in response to our Threat Advisories, and also included additional measures to further protect nuclear power plants. The newly required safeguards measures (whose details are not available to the public) include more patrols, more security personnel, and physical and vehicle barrier modifications. The orders also require additional security measures pertaining to waterways and owner-controlled land outside the plants' protected areas. The NRC Staff has confirmed that, as of August 31st, all nuclear power plant licensees are in compliance with the requirements set forth in these orders. In addition, the Staff is conducting independent inspections at licensee sites.

We have subsequently issued similar security-driven orders to Honeywell International, Inc., for its uranium conversion facility in Metropolis, Illinois, on March 25th; to General Electric Company for its wet storage facility in Morris, Illinois, on May 23d; to twelve nuclear plants that are being decommissioned also May 23d; to two enriched uranium fuel fabricators (BWX Technologies, Inc. and Nuclear Fuel Services) on August 22d; and to independent spent fuel storage facilities using dry cask storage on October 23d.

This set of orders will remain in effect until either the threat environment changes or we determine that additional orders or rules are needed.

In a related action, in January we increased the full-time staffing at the NRC Headquarters Operations Center, which takes in fast-breaking security and safety information. In April, we established a new Office of Nuclear Security and Incident Response. The new office is responsible for immediate operational security and safeguards issues as well as for long-term policy development. It works closely with law enforcement agencies and the Office of Homeland Security. It also coordinates the NRC's ongoing comprehensive security review, including (for example) a major research effort to evaluate the vulnerabilities and potential effects of a large commercial aircraft crashing into a nuclear facility or into storage and transportation casks – issues raised in this proceeding.

B. Facts and Procedural Posture of This Case

PFS seeks a license to operate an ISFSI on the Skull Valley Goshute Indian Reservation in Utah. During the course of this litigation and prior to September 11, 2001, the Licensing Board admitted numerous issues for hearing, many of which await final merits resolution. But the Board rejected various contentions relating to the risks of terrorism or sabotage at the proposed facility, finding each to be inadmissible.[7]

In response to the terrorist attacks of September 11, 2001, Intervenor Utah asked the Board to admit its late-filed contention Utah RR, Suicide Mission Terrorism and Sabotage, which claimed violations of both the AEA and NEPA. Utah contended that the events of September 11 had materially changed the circumstances under which the Board

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[7] *See* LBP-98-13, 47 NRC 360, 372 (1998); LBP-98-10, 47 NRC 288, 296 (1998); LBP-98-7, 47 NRC 142, 186, 199, 216, 226, 233-34, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998).

had rejected previously proffered terrorism related contentions by showing that a terrorist attack is both more likely and potentially more dangerous than previously thought.

Utah's new AEA "terrorism" claim argued that PFS's Safety Analysis Report and the Staff's Safety Evaluation Report failed to identify and adequately evaluate external man-induced events such as suicide mission terrorism and sabotage, "based on the current state of knowledge about such events," as required by an NRC rule.[8] The Board found this argument an impermissible attack on NRC rules because, in promulgating security rules applicable to ISFSIs, the Commission had specifically considered and rejected requiring protection against the malevolent use of an airborne vehicle.[9]

Utah's new NEPA "terrorism" claim argued that PFS's Environmental Report and the NRC Staff's draft Environmental Impact Statement (EIS)[10] were deficient in failing to consider the environmental consequences of terrorists flying a fully loaded commercial jumbo jet into the PFS facility. Relying on a 1973 Appeal Board decision in the *Shoreham* proceeding,[11] the Board found that the rationale for excluding acts of war in our safety analysis — that this is the responsibility of the national defense establishment — applies equally to a NEPA analysis. Therefore, the Board

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[8] *See* 10 C.F.R. § 72.94.

[9] LBP-01-37, 54 NRC at 485-86. *See* Final Rule, "Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste," 63 Fed. Reg. 26,955-56 (May 15, 1998).

[10] The Final Environmental Impact Statement, dated December 2001, was not yet available at the time Utah submitted its contention and the Board made its ruling.

[11] *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973).

held that the NRC's NEPA responsibilities did not include considering the effects of terrorism.[12] The Board also cited a 1989 Third Circuit decision, *Limerick Ecology Action v. NRC*,[13] which found that NRC had no duty to perform a "probabilistic risk assessment" of the risk of sabotage in an EIS because the petitioners had failed to show that such an assessment was possible.[14] Noting, however, that the extraordinary events of September 11 may have changed what can be said to be "reasonably foreseeable," the Board referred its terrorism ruling for immediate Commission review.[15]

We accepted review, asking parties to address all issues "the parties determine are relevant," and in addition the question: "What is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001?"[16]

On review, Utah has abandoned its AEA-terrorism claim and focused on its NEPA-terrorism claim.[17] Its NEPA claim does not ask that the NRC Staff inquire into or predict the

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[12] LBP-01-37, 54 NRC at 487. *See* 10 C.F.R. § 50.13, "Attacks and destructive acts by enemies of the United States; and defense activities." This provision relieves reactor license applicants from providing for design features that protect against "enemies of the United States." By its terms, section 50.13 applies to production and utilization facilities only. It therefore does not apply directly to ISFSIs such as the one at issue in this proceeding.

[13] 869 F.2d 719, 743-44 (3d Cir. 1989).

[14] LBP-01-37, 54 NRC at 487.

[15] *See id.* at 487-88.

[16] CLI-02-3, 55 NRC at 162.

[17] *See* State of Utah's Brief in Response to CLI-02-03 and in Support of Utah's Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage), dated Feb. 27, 2002, at 3 n.2.

likelihood of a September 11-style terrorist attack on the proposed ISFSI, but argues that the mere fact that these attacks occurred at other U.S. targets makes such an attack a reasonably foreseeable environmental impact of erecting this facility, requiring a NEPA review. Utah asks the Commission simply to assume an attack and go straight to analyzing its consequences. Both PFS and the NRC Staff, citing the *Shoreham* and *Limerick Ecology Action* decisions, maintain that terrorism and other intervening malevolent acts lie outside NEPA and need not be considered under that statute.

II. ANALYSIS

A. Introduction

The issue here is whether an unquantifiable threat of terrorism, in this case a suicidal air crash of a jumbo jetliner into an ISFSI, raises the kinds of environmental concerns that call for a NEPA review in an EIS. That is, does it serve the purposes of NEPA to include in an EIS a discussion of the impact of a catastrophic event that is not directly linked to an NRC licensing decision and the likelihood of which is impossible to quantify?

Terrorism differs from matters ordinarily considered in an EIS. The proposed PFS facility's EIS, for example, considers such matters as likely effects on local water, air quality, vegetation, wildlife, culture, and lifestyle. These effects are reasonably certain; an EIS can quantify them to a fair degree of precision. Terrorism, by contrast, comes in innumerable forms and at unexpected times and places. It is decidedly not predictable. And it is not a natural or inevitable byproduct of licensing the PFS facility.[18] In our

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[18] The Commission evaluates the impacts of accidents precipitated by natural events such as earthquakes, hurricanes, and other severe storms. Unlike acts of terrorism, such events are closely linked to the natural environment of the area within which a facility will be located, and are reasonably predictable by examining weather

view, an EIS is not an appropriate format to address the challenges of terrorism. The purpose of an EIS is to inform the decisionmaking agency and the public of a broad range of environmental impacts that will result, with a fair degree of likelihood, from a proposed project, rather than to speculate about "worst-case" scenarios and how to prevent them.

By its own terms, NEPA is not absolute. It directs federal agencies "to use all practicable means, consistent with other considerations of national policy," in environmental reviews.[19] The NEPA process is governed by a "rule of reason."[20] It does not extend to all conceivable consequences of agency decisions, no matter how far down the causal chain from a nuclear licensing decision and no matter how unpredictable. Using the NEPA process to consider terrorism also would be incompatible with NEPA's (and the NRC's) public participation process. In the wake of September 11, an overriding government priority is to avoid disclosing to terrorists themselves precisely where and how nuclear facilities might be most vulnerable and what steps are being taken to lessen terrorists' chance of success. Yet it would not be possible to embark upon a meaningful NEPA review of any type without engaging such subjects. NEPA does not override our concern for making sure that sensitive

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patterns and geological data for that region. We do not know of similar principles that would permit reasonable prediction of an act of terrorism against a particular facility. Terrorism is a global issue, involving stochastic criminal behavior, independent of the planned facility.

[19] *See* 42 U.S.C. § 4331(b).

[20] *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295 n.41 (2002).

security-related information ends up in as few hands as practicable.

We hasten to add that our decision against including terrorism within our NEPA reviews does not mean that we plan to rule out the possibility of a terrorist attack against NRC-regulated facilities. On the contrary, as we outlined above, the Commission and its Staff have taken steps to strengthen security and are in the midst of an intense study of the effects of postulated terrorist attacks and of our relevant security and safeguards rules and policies. These activities are rooted in the NRC's ongoing responsibilities under the AEA to protect public health and safety and the common defense and security. But we see no practical benefit in conducting that review, case-by-case, under the rubric of NEPA, nor any legal duty to do so. Below we set out a series of factors cutting against using the NEPA framework to conduct a terrorism review and against admitting Utah's NEPA-terrorism contention for hearing. These factors stand singly, and cumulatively, as justification against invoking NEPA as the basis for our terrorism review in nuclear licensing cases.

B. NEPA's Goals and the Rule of Reason

We begin with general NEPA requirements. NEPA demands that federal agencies prepare a "detailed statement * * * on the environmental impact" of any proposed major federal action "significantly affecting the quality of the human environment."[21] Council on Environmental Quality (CEQ) regulations, which offer agencies guidance on NEPA compliance, provide that the EIS must discuss direct and indirect effects of the action.[22] Direct effects are "caused by

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[21] *See* 42 U.S.C. § 4332(2)(C)(i).

[22] 40 C.F.R. § 1502.16. Although the Commission is not bound by CEQ regulations that it has not expressly adopted (*see Limerick Ecology Action*, 869 F.2d at 743), the Commission gives those regulations "substantial deference." *See Long Island Lighting Co.*

the action and occur at the same time and place."[23] Indirect effects are "caused by the action and are later in time or farther removed in distance, but are still *reasonably foreseeable,*" such as growth-inducing effects.[24] CEQ regulations also caution that the EIS should not be overbroad.[25]

NEPA's "dual purpose" is to ensure that federal officials fully take into account the environmental consequences of a federal action before reaching major decisions, and to inform the public, Congress, and other agencies of those consequences.[26] These purposes inform our determination whether the potential impact of a terrorist attack is the type of information Congress intended for agencies to include in an EIS.

It is well established that NEPA requires only a discussion of "reasonably foreseeable" impacts.[27] Grappling with this concept, various courts have described it as a "rule

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(Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 72 n.2 (1991).

[23] 40 C.F.R. § 1508.8(a).

[24] 40 C.F.R. § 1508.8(b) (emphasis added).

[25] Environmental impact statements should be "analytic rather than encyclopedic," and "shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and these regulations." 40 C.F.R. § 1502.2(a), (b).

[26] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983); *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273, 1291 (1st Cir. 1996).

[27] *See, e.g., Wyoming Outdoor Council, Inc. v. U.S. Forest Service*, 165 F.3d 43, 49 (D.C. Cir. 1999); *Dubois v. U.S. Dept. of Agric.*, 102 F.3d at 1286; *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

of reason,"[28] or "rule of reasonableness,"[29] which excludes "remote and speculative"[30] impacts or "worst-case" scenarios.[31] Courts have excluded impacts with either a low probability of occurrence,[32] or where the link between the agency action and the claimed impact is too attenuated to find the proposed federal action to be the "proximate cause" of that impact.[33] NEPA does not call for "examination of every conceivable aspect of federally licensed projects."[34] Here, the possibility of a terrorist attack on the PFS facility is

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[28] *See Davis v. Latschar*, 202 F.3d 359, 368 (D.C. Cir. 2000); *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1300-01 (D.C. Cir. 1984), *vacated on other grounds*, 760 F.2d 1320 (D.C. Cir. 1985).

[29] *See Limerick Ecology Action*, 869 F.2d at 745; *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

[30] *See Limerick Ecology Action*, 869 F.2d at 739; *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974).

[31] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. at 354; *Edwardsen v. U.S. Department of the Interior*, 268 F.3d 781, 785 (9th Cir. 2001).

[32] *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d at 1300-01 (NRC's exclusion from EIS of consequences of Class 9 accidents upheld in light of agency's finding that there was an extremely low probability of occurrence).

[33] *See Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 760, 772-75 (1983). *See also Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1163 (9th Cir. 1998); *No GWEN Alliance of Lane County v. Aldridge*, 855 F.2d 380, 1385-86 (9th Cir. 1988). "At bottom the notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient." *Holmes v. SIPC*, 503 U.S. 258, 268 (1992) (internal quotations omitted). The concept confines NEPA to "manageable" inquiries. *Metropolitan Edison*, 460 U.S. at 776.

[34] *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102-03 (1998). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 155-56 (2002).

speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.

Two federal court of appeals decisions have addressed the issue of terrorism and NEPA in the area of nuclear regulation. Both decisions upheld, as reasonable, an agency refusal to consider terrorism under NEPA. In *Limerick Ecology Action v. NRC,* the Third Circuit determined that in licensing a nuclear power reactor the NRC could decline to consider the effects of terrorism in an EIS because the intervenors had not shown any way to predict or analyze the risk meaningfully.[35] Similarly, in *City of New York v. U.S. Department of Transportation,* the Second Circuit held that, in permitting the transport of nuclear materials, the Department of Transportation need not perform a NEPA analysis of the effects of sabotage – because agencies had discretion to exclude such high-consequence, low probability events:

> DOT simply concluded that the risks of sabotage were too far afield for consideration. To a large degree this judgment was justified by the record. Substantial evidence indicated that sabotage added nothing to the risk of high-consequence accidents. Even the least sanguine commentators could say only that sabotage added an unascertainable risk. In light of these conflicting points of view, it was within DOT's discretion not to discuss the matter further beyond adopting the NRC security requirements.[36]

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[35] 869 F.2d at 744.

[36] 715 F.2d 732, 750 (2d Cir. 1982), *appeal dismissed and cert. denied,* 465 U.S. 1055 (1984).

In short, the only two directly pertinent court of appeals decisions, *Limerick Ecology Action* and *City of New York*, give us no reason to include terrorism within our NEPA review.[37]

It is sensible to draw a distinction between the likely impacts of the PFS facility and the impacts of a terrorist attack on the facility. Absent such a line, the NEPA process becomes truly bottomless, subject only to the ingenuity of those claiming that the agency must evaluate this or that potential adverse effect, no matter how indirect its connection to agency action. In our view, the causal relationship between approving the PFS facility and a third party deliberately flying a plane into it is too attenuated to require a NEPA review, particularly where the terrorist threat is entirely independent of the facility. Nonetheless, we examine below the broad scope of NEPA law to determine if there is any reason to view terrorism differently today, in the wake of the notorious September 11 attacks on the World Trade Center and the Pentagon.

C. The Risk of a Terrorist Attack Cannot Be Adequately Determined

The horrors of September 11 notwithstanding, it remains true that the likelihood of a terrorist attack being directed at a particular nuclear facility is not quantifiable. Any attempt at quantification or even qualitative assessment would be highly speculative. In fact, the likelihood of attack cannot be ascertained with confidence by any state-of-the-art methodology. That being the case, we have no means to assess, usefully, the risks of terrorism at the PFS facility. Risk, of course, is generally thought of as "the product of the

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[37] *See also No GWEN Alliance of Lane County v. Aldridge*, 855 F.2d at 1385-86 (speculation that a foreign nation might target military radio towers in a nuclear war does not trigger a NEPA duty to study the effects of such an attack).

probability of occurrence [and] the consequences."[38] Here, though, we have no way to calculate the probability portion of the equation, except in such general terms as to be nearly meaningless.

Utah has presented no evidence of a system or technique for assessing accurately the probability of a terrorist attack in general or a September 11-type attack specifically. It argues, however, that qualitative factors could show that a terrorist threat is "reasonably foreseeable." It gives as an example a situation where a terrorist group, with the apparent wherewithal to mount such an attack, makes a specific threat against a facility or class of facilities. Although the probability of such attacks would still not be measurable, the threats would make attacks reasonably foreseeable and thus subject to NEPA, according to Utah. We note that there has been no such threat, however, against the proposed PFS facility.

If we were to speculate on the probability of the scenario in Utah's contention – a hijacked jumbo jet hitting the PFS facility and causing catastrophic effects – our guess is that the probability is actually minuscule. For one thing, Congress and the Federal Aviation Administration (FAA) have put in place enhanced anti-hijacking measures at airports and on commercial airplanes (*e.g.*, enhanced passenger and baggage screening, strengthening of cockpit doors, the Air Marshall program). Moreover, the United States intelligence community and various law enforcement agencies have increased their efforts to identify potential terrorists and prevent potential attacks before they occur. For instance, the FAA and Department of Defense have acted more than once to protect the airspace above nuclear power

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[38] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 262 (2001).

plants from what were thought at the time to be credible threats.[39]

In addition, terrorists seeking to cause havoc and destruction would find many targets far more inviting than the proposed PFS facility. That facility would be located in a remote, desert location far from population centers. And it would use NRC-approved strong storage casks, which are designed to minimize the effects of off-normal events and accidents.[40] Given this setting, a terrorist attack seemingly would be quite unlikely to result in a high-consequence release of radioactivity.

Because we have seen no evidence to the contrary, in this proceeding or elsewhere, we conclude that the risk of a terrorist attack on the proposed PFS facility (and other nuclear facilities) is beyond this agency's ability to determine meaningfully. Utah has not proposed other means to evaluate terrorism, besides suggesting that the NRC simply assume, on the basis of the September 11 terrorist attacks, that the PFS facility is at risk. This we decline to do, as it would transform NEPA analysis into a form of guesswork and distort NEPA's cost-benefit calculus. As in *Limerick Ecology Action, Inc. v. NRC*, therefore, the contention here fails to provide "some method or theory by which the NRC could * * * enter[ ] into a meaningful analysis of the risk of sabotage despite its asserted inability to quantify the risks."[41]

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[39] *See PSEG Nuclear LLC* (Salem Nuclear Generating Station, Units 1 and 2; Hope Creek Generating Station), DD-02-3, 56 NRC 243, 255-57 (2002).

[40] *See generally* NUREG-1714, "Final Environmental Impact Statement for the PFS Facility," Vol. 1, at 4-49 through 4-53 (December 2001).

[41] 869 F.2d at 744.

D. NEPA Does Not Require a "Worst-Case" Analysis

Utah's proposed approach – that the NRC assume the likelihood of a suicidal air crash into the PFS facility and calculate the consequences – amounts to a form of "worst-case" analysis. While that approach at one time found favor in NEPA case law, today it stands discredited. Both the Supreme Court and CEQ have concluded that NEPA does not call for a "worst-case" inquiry, which, it is now recognized, simply creates a distorted picture of a project's impacts and wastes agency resources.[42]

In theory, as the NRC Staff brief acknowledges, the NRC could attempt to perform a "worst-case" analysis on the basis of much conjecture and numerous assumptions. But is it useful or legally necessary to do so? For instance, with no meaningful way to determine the probability that terrorists will attack the PFS facility, the most that can be said is that a repeat of the September 11 scenario, this time directed at PFS rather than an office building, is a theoretical possibility. A theoretical possibility, though, is not the same as a "reasonably foreseeable" impact, the usual trigger-point for NEPA reviews. Substituting theoretical possibility for probability analysis amounts to a worst-case approach. It exaggerates a project's risks and might unduly alarm the public.

In *Robertson v. Methow Valley Citizens Council,* the Supreme Court held that NEPA's "twin functions – requiring agencies to take a 'hard look' at the consequences of the proposed action and providing important information to other groups and individuals" – do not call for an inquiry into worst-case possibilities.[43] The Court pointed with approval to CEQ's 1986 abandonment of a regulation that

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[42] *Robertson v. Methow Valley Citizens Council,* 490 U.S. at 354-55.

[43] *Id.* at 356.

had required EISs to include worst-case analyses.[44] The Court stated that CEQ's original rule had led agencies to devote substantial effort to "limitless" analyses – "that is, one can always conjure up a worse 'worst case' by adding an additional variable to a hypothetical scenario."[45] CEQ's new focus on "reasonably foreseeable impacts," the Court said, "will generate information of greatest concern to the public and of greatest relevance to the agency's decision, rather than distorting the decisionmaking process by overemphasizing highly speculative harms."[46]

Under *Robertson,* an analysis of a hypothetical terrorist attack has no place in the EIS for the PFS facility. NEPA's mandate to federal agencies, as we see it, is to consider a broad range of environmental effects that are reasonably likely to ensue as a result of a major agency action, not to engage in speculation about what might happen as a result of criminal terrorist activities. The PFS EIS discusses a range of likely impacts, including radiological impacts on workers and the public, air quality impacts, impacts on plant life, visual impacts, impacts on wildlife, and socioeconomic and cultural impacts on the local community. While not all these effects can be "measured" or "determined" in a concrete fashion – for example, the facility's impact on scenic values – the Staff can say with some degree of certainty that the impacts studied will take place.

This is in striking contrast to the impacts of an airborne terrorist attack at the PFS site using a commercial aircraft, an event that could possibly happen but is hardly a natural or expected consequence of licensing the facility. Utah says that

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[44] *Id.* at 354-56; *see* 40 C.F.R. § 1502.22 (1985) (requiring worst-case analysis).

[45] 490 U.S. at 356 n.17, *quoting* CEQ Proposed Rule, "National Environmental Policy Act Regulations," 50 Fed. Reg. 32,234, 32,236 (Aug. 9, 1985).

[46] *See* 490 U.S. at 356.

we should take guidance from *Sierra Club v. Marsh,* a First Circuit decision concluding that "reasonable foreseeability" under NEPA means that "the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[47] Distinguishing "reasonably foreseeable" effects from those that are "highly speculative," the court asked: "With what confidence can one say that the impacts are likely to occur?"[48] Utah, in turn, asks its own question under the *Sierra Club v. Marsh* formulation, "What person of ordinary prudence would not want to know, before deciding to license a facility that might some day house the nation's entire current inventory of spent nuclear fuel, what the reasonably foreseeable environmental impacts would be of an airborne assault on the facility?"[49]

Utah asks the wrong question. The "reasonably foreseeable" effects of a successful attack with a jumbo jet against the PFS facility are not the same as the "reasonably foreseeable" impacts of simply licensing the facility. Utah's attempt to conflate the probability of the initiating event (terrorism) with its consequences simply skips over the question whether the impacts are "likely to occur," a key element of *Sierra Club v. Marsh's* "ordinary prudence" test.

With Utah having provided no reason to believe that an airborne terrorist attack on the PFS facility is "likely to occur" – indeed, Utah asks us simply to *assume* that it will – we cannot conclude that such an attack is a "reasonably foreseeable" impact of building the proposed ISFSI. To hold otherwise would mean that we would have to consider such attacks foreseeable at any facility under our jurisdiction.

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[47] 976 F.2d at 767. *See also Dubois v. U.S. Dept. of Agric.,* 102 F.3d at 1286.

[48] 976 F.2d at 768, *quoting Sierra Club v. Marsh,* 769 F.2d 868, 878 (1st Cir. 1985).

[49] *See* Utah's Brief at 8.

And Utah's view of foreseeability does not seem confined to airborne terrorist attacks. On Utah's approach, presumably all other kinds of terrorism, if conceivable, would require NEPA review as well, both in EISs and at NRC hearings. Such an open-ended approach to NEPA is unworkable because it has no stopping point.[50] As the Supreme Court noted in *Robertson*, it is always possible to "conjure up" progressively more disastrous scenarios.[51]

The Court's rejection of worst-case NEPA reviews in *Robertson* relieves agencies of the arduous and unproductive task of analyzing conceivable, but very speculative, catastrophes. It also enables agencies to use their limited resources more effectively.[52]

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[50] To put the burden of considering threats of terrorism into perspective, it is useful to consider the cumulative burden on the federal government as a whole that would result from such free-ranging inquiries. Because there are no limits or natural boundaries to the possibility of a terrorist strike, if one were to conclude that NEPA requires an agency to consider such threats, then the environmental reviews for thousands of federal actions throughout the nation would be required to consider terrorism, including those for individual highways, dams, bridges, etc.

This is not to suggest that an environmental review should never consider the threat of terrorism. We address today only whether NEPA *requires* such a study. In fact, the NRC has briefly considered, as a matter of discretion, the issue of terrorism in generic environmental reviews for certain broad categories of activities. *See, e.g.*, NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Vol. 1, § 5.3.3.1, at p. 5-18 (May 1996); NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Vol. 1, Addendum 1, Appendix 1 at p. A1-17 (August 1999).

[51] *See* 490 U.S. at 356 n.17.

[52] *See Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 463 (1999); *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Units 1 and 2;

E. NEPA's Public Process Is Not a Forum for Sensitive Security Issues

Although we conclude in the previous discussion that there is no basis on which to provide a reasonable measure of the risk of terrorism and that the risk of terrorism is far afield from issues involving the natural environment of the facility, the Commission is presently engaged in analyzing how to keep such risk at a minimum. Part of this effort is to protect sensitive information from falling into the hands of those with malevolent intentions. The public aspect of NEPA processes conflicts with the need to protect certain sensitive information. NEPA requires agencies to include the public in NEPA reviews.[53] Indeed, public information and public participation form a large part of NEPA's *raison d'etre.*[54] At the NRC, public input includes not just an opportunity to comment on draft EISs, but also an opportunity to contest environmental findings at agency hearings on the licensing action in question.

In our view, the public interest would not be served by inquiries at NRC hearings and public meetings into where and how nuclear facilities are vulnerable, how they are protected and secured, and what consequences would ensue if security measures failed at a particular facility. Such

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Oyster Creek Nuclear Generating Station), CLI-85-4, 21 NRC 561, 563-64 (1985), *quoting Rockford League of Women Voters v. NRC*, 679 F.2d 1218, 1222 (7th Cir. 1982); *Westinghouse Electric Corp.* (Exports to the Philippines), CLI-80-14, 11 NRC 631, 649 (1980). *See generally Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972) (NEPA "must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given * * * that the resources of energy and research — and time — available to meet the Nation's needs are not infinite").

[53] *See* 42 U.S.C. § 4332.

[54] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. at 356.

NEPA reviews may well have the perverse effect of assisting terrorists seeking effective means to cause a release of radioactivity with potential health and safety consequences.

Years ago, before NEPA's enactment, the Atomic Energy Commission (AEC) considered the question whether it should use its hearing process to assess the risk of "enemy attack or sabotage" against a particular facility (the Turkey Point reactor in Florida).[55] The AEC rejected the idea, holding that "examination into the above matters, apart from their extremely speculative nature, would involve information singularly sensitive from the standpoint of * * * our national defense."[56] Such matters, according to the AEC, are "clearly not amenable to board consideration and determination."[57] The AEC commented that it "would not propose to make them cognizable issues in the absence of a clear Congressional direction to that end."[58] Congress has enacted no such directive.

NEPA does not override the AEC's (and our) concern for making sure that sensitive security-related information ends up in as few hands as practicable. NEPA itself includes limiting provisions. Section 101(b) of NEPA requires agencies to implement the statute's policies using "all *practicable* means, consistent with *other essential considerations of national policy.*"[59] Another passage in the same section

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[55] *Turkey Point*, 4 AEC at 13-14, *aff'd sub nom. Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968).

[56] *Id.* at 14.

[57] Id.

[58] Id.

[59] 42 U.S.C. § 4331(b) (emphases added). *See also* NEPA § 101(a), 42 U.S.C. § 4331(a) ("it is the continuing policy of the Federal Government * * * to use all *practicable* means and measures * * * . [t]o create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic,

provides that the federal government's efforts to "attain the widest range of beneficial uses of the environment" are subject to restraints based on "risk to health and safety, or other undesirable and unintended consequences."[60] These provisions caution against using the NEPA process for a terrorism review. A full-scale NEPA process inevitably would require examination not only of how terrorists could cause maximum damage but also of how they might best be thwarted. But keeping those kinds of information secret is vital. To use NEPA's own terms, confidentiality in this area is an "essential consideration of national policy," protects against "risks to health and safety," and avoids "undesirable and unintended consequences."

For the NRC, protecting safeguards information is not simply a policy choice. It is *required* by law. Section 147 of the AEA provides that the NRC "shall" prohibit unauthorized disclosures of key security-related information. Consequently, the NRC cannot make publicly available the kind of information necessary for a more than superficial NEPA review.[61] This limitation on information availability supports our decision not to use NEPA, in part a public information statute, as our vehicle to analyze terrorism.[62]

We recognize that in *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981) (which did not involve issues of

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and other requirements of present and future generations of Americans" (emphasis added)).

[60] 42 U.S.C. § 4331(b)(3).

[61] *See Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1027 (9th Cir. 1988) ("[e]veryone recognizes the catastrophic results of the failure of the dam; to detail these results would serve no useful purpose").

[62] *Cf. Public Citizen v. Federal Aviation Administration*, 988 F.2d 186 (D.C. Cir. 1993) (FAA's statutory mandate to protect airport security overrides Administrative Procedure Act's notice-and-comment and publication requirements for rulemakings).

terrorism), the Court indicated that the Navy should perform a NEPA review in the given circumstances, and factor it into its decision[illegible]king, even if the NEPA results could not be publicized [illegible]judicated.[63] Such a review would be useful to an agency that otherwise might not consider an issue relevant to licensing. But here, a formal NEPA review, secret or otherwise, would not add meaningfully to our understanding of the terrorism issue, in light of our ongoing studies and existing requirements and directives. And widespread NEPA-terrorism reviews, even if we attempted to keep EISs and hearings confidential, increase the risk of dangerous security breaches.

As we explained above in detail,[64] our refusal to assess terrorism's risks under the ritualized NEPA process – EISs, public comment, adjudicatory hearings – hardly means that the NRC is ignoring those risks, either at individual facilities or in general. Working closely with the Office of Homeland Security and with other agencies, the NRC after September 11 has shifted substantial resources and personnel to a study of the terrorism threat. We already have upgraded security requirements, with more improvements in the pipeline. Our agency is engaged in intensive research on facility vulnerabilities; it is considering additional or alternate means of protection; and it is looking in particular at the effects of suicidal crashes of large commercial airplanes,[65] the focus of Utah's contention here.

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[63] 454 U.S. 139, 143 (1981).

[64] *See* Section I.A, *supra*, entitled "Overview."

[65] *See PSEG Nuclear LLC* (Salem Nuclear Generating Station, Units 1 and 2; Hope Creek Generating Station), DD-02-3, 56 NRC 243, 262 (2002), *review declined*, unpublished letter of NRC Secretary (Dec. 6, 2002):

> [T]he NRC, in conjunction with DOE laboratories, is continuing a major research and engineering effort to evaluate the vulnerabilities and potential effects of a large commercial

Given our existing efforts, it is not obvious what additional information or insights a formal NEPA review might bring into play.[66] We already are reviewing terrorism from nearly every conceivable angle. We have in place substantial security requirements for our facilities and are studying whether additional action is necessary. Thus, even if terrorism were a matter cognizable under NEPA – and for the reasons given above we believe it is not – it would elevate form over substance to insist that we supplement our ongoing comprehensive review with a duplicative or formalistic NEPA study.[67]

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aircraft impacting a nuclear power plant. This effort also includes consideration of possible additional preventive or mitigative measures to further protect public health and safety in the event of a deliberate aircraft crash into a nuclear power plant or spent fuel storage facility. The final results from that analysis are not yet available. If the ongoing research and security review recommends any other security enhancements, the NRC will take the appropriate action.

[66] Although the Commission concludes that NEPA does not call for a formalistic NEPA study on the impacts of terrorism, the FEIS for the PFS project will include the Commission's comprehensive discussion here of the terrorism issue. *See Claiborne*, CLI-98-3, 47 NRC at 89 ("The adjudicatory record and the Board decision (and, of course, any Commission appellate decisions) become, in effect, part of the FEIS. *See, e.g., Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 705-07 [1985].").

[67] *See Friends of the River v. Federal Energy Regulatory Commission*, 720 F.2d 93, 106-08 (D.C. Cir. 1983).

III. CONCLUSION

For the foregoing reasons, we decline to require a NEPA review of the impact of terrorism at the proposed PFS facility. We therefore *affirm* the Licensing Board decision rejecting Utah's late-filed terrorism contention (Late-Filed Contention Utah RR).

IT IS SO ORDERED.

For the Commission[68]

ANNETTE L. VIETTI-COOK

Secretary of the Commission

Dated at Rockville, Maryland,

this 18th day of December 2002.

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[68] Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

APPENDIX D

EXCERPT FROM SAN LUIS OBISPO MOTHERS FOR PEACE ET AL. SUPPLEMENTAL REQUEST FOR HEARING AND PETITION TO INTERVENE (FILED ON JULY 18, 2002)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY
AND LICENSING BOARD

In the matter of Docket # 72-26 Pacific
Gas and Electric Company
Diablo Canyon Nuclear Power Plant
Unit Nos. 1 and2
Independent Spent Fuel Storage Installation July 18, 2002

SUPPLEMENTAL REQUEST FOR HEARING AND PETITION TO INTERVENE BY SAN LUIS OBISPO MOTHERS FOR PEACE, AVILA VALLEY ADVISORY COUNCIL, PEG PINARD, CAMBRIA LEGAL DEFENSE FUND, CENTRAL COAST PEACE AND ENVIRONMENTAL COUNCIL, ENVIRONMENTAL CENTER OF SAN LUIS OBISPO, NUCLEAR AGE PEACE FOUNDATION, SAN LUIS OBISPO CHAPTER OF GRANDMOTHERS FOR PEACE INTERNATIONAL, SAN LUIS OBISPO CANCER ACTION NOW, SANTA MARGARITA AREA RESIDENTS TOGETHER, SANTA LUCIA CHAPTER OF THE SIERRA CLUB, AND VENTURA COUNTY CHAPTER OF THE SURFRIDER FOUNDATION

In accordance with the Nuclear Regulatory Commission's ("NRC's" or "Commission's") "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2, and the

Atomic Safety and Licensing Board's ("ASLB's) Initial Prehearing Conference Order of June 6, 2002, the San Luis Obispo Mothers for Peace (SLOMFP), Avila Valley Advisory Council ("AVAC"), Peg Pinard, Cambria Legal Defense Fund, Central Coast Peace And Environmental Council, Environmental Center Of San Luis Obispo, Nuclear Age Peace Foundation, San Luis Obispo Chapter of Grandmothers For Peace International, San Luis Obispo Cancer Action Now, Santa Lucia Chapter of the Sierra Club, and Ventura County Chapter of the Surfrider Foundation, hereby submit contentions challenging the adequacy of Pacific Gas & Electric Company's ("PG&E's") December 21, 2001, application for a license for an independent spent fuel storage installation ("ISFSI") at the Diablo Canyon Nuclear Power Plant. SLOMFP will act as a lead intervenor with respect to all of these contentions. As demonstrated below, the contentions satisfy the NRC's admissibility requirements in 10 C.F.R. § 2.714(b).

* * * * *

ENVIRONMENTAL CONTENTIONS

Contention EC-1: Failure to Address Environmental Impact of Destructive Acts of Malice or Insanity

Contention: The Environmental Report's discussion of environmental impacts is inadequate because it does not include the consequences of destructive acts of malice or insanity against the proposed ISFSI.[9]

Basis: The ER does not contain any discussion of the environmental impacts of destructive acts of malice or insanity. This omission is consistent with the NRC's long-established policy, now under serious question, of refusing to

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[9] This contention is supported by the Declaration of Dr. Gordon R. Thompson in Support of Intervenors' Environmental Contentions (July 18, 2002), attached as Exhibit 7.

examine the environmental impacts of destructive acts of malice or insanity. *See Philadelphia Electric Co. (Limerick* Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697-701 (1985), *aff'd on this ground and rev'd on other grounds, Limerick Ecology Action v. NRC*, 869 F.2d 719, 743-44 (3rd Cir. 1989). The NRC's basis for this policy was that it was unable to make a meaningful assessment of the risks of sabotage. *Id.* Recently, the NRC undertook to reconsider this policy, in response to terrorism-related NEPA contentions that were raised in several pending licensing proceedings following the events of September 11, 2001. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 1), CLI-02-05, 55 NRC 161 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-04, 55 NRC 158 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), Catawba Nuclear Station, Units 1 and 2), CLI-02-04, 55 NRC 164 (2002); *Private Fuel Storage, L.L.C.* (Independent Fuel Storage Installation), CLI-02-03, 55 NRC 155 (2002).

The Intervenors respectfully submit that this licensing proceeding constitutes yet another instance in which there is a demonstrable need to revisit the Commission's policy of refusing to consider environmental impacts of destructive acts of malice or insanity against nuclear facilities. As of September 11, 2001, it is now clear that terrorists are both capable of and intent upon causing major damage to life and property in the United States. Terrorists have openly admitted that nuclear power stations are near the top of their lists as targets for attacks on civilians in the United States.[10]

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[10] On October 30, 2001, for example, the Washington Post reported on an interview with a jailed disciple of Osama bin Laden who said there are "more important places, like atomic plants and reactors" that may have been more appropriate targets than the World Trade Center. William Branigan, *In Afghan Jail, a Terrorist Who Won't Surrender*, Washington Post, October 30, 2001, at A 13, attached as Exhibit 8.

Earlier this year, in his State of the Union Address, President Bush announced that diagrams of American nuclear plants had been found in Afghanistan. President Bush is also quoted in the San Luis Obispo newspaper, "The Tribune" (June 7, 2002) as follows: " * * * we now know that thousands of trained killers are plotting to attack us and this terrible knowledge requires us to act different[ly]." In a speech made on January 17, 2002, Dr. Richard A. Meserve, Chairman of the NRC, stated that, in regard to reactor containments, "which are extremely robust, typically being constructed with two to five feet of reinforced concrete with an interior steel lining * * * the design basis threat does not include an aircraft attack." If the containment buildings are not designed to withstand an aircraft attack, then spent fuel storage facilities, which lack a containment, must be assumed to be at least as vulnerable as reactors. PG&E's proposal of 140 unprotected casks installed on concrete pads provides an inviting terrorist target.

Terrorist events during recent years, which were previously discounted by the NRC as unworthy of consideration in its environmental reviews, must now be re-examined in light of the September 11 attack. Taken together, they highlight a number of significant factors: the vulnerability of U.S. facilities and institutions; the sophistication of the attackers; and the persistence of efforts to damage major U.S. facilities. These events include: the 1983 bombing of the Marine barracks in Beirut; the 1993 bombing of the World Trade Center; the February 1993 intrusion into the Three Mile Island site, in which the intruder crashed his station wagon through the security gate and rammed it under a partly opened door in the turbine building; the 1995 bombing of a federal building in Oklahoma City; the plot to bomb the United Nations Building, FBI offices in New York City, the Lincoln Tunnel, the Holland Tunnel, and the George Washington Bridge; the 1998 bombing of the U.S. embassies in Tanzania and Kenya; and the 2000 bombing of the U.S.S. Cole.

In fact, the Commission has already taken some steps towards recognizing the foreseeability of destructive acts of malice or insanity against nuclear facilities. In the 1994 vehicle bomb rulemaking, which was directly responsive to the World Trade Center bombing and the Three Mile Island vehicle intrusion incident, the Commission abandoned its previous position that the difficulty of quantifying the probability of such events means that they can be ignored. The rationale for the 1994 vehicle-bomb rule demonstrates that the NRC has the capacity and information necessary to perform a qualitative analysis of the potential for acts of malice or insanity. In that instance, the NRC performed a "conditional probabilistic risk analysis" to assess the vulnerability of a nuclear power plant to a vehicle bomb. *See* Final Rule, Protection Against Malevolent Use of Vehicles at Nuclear Power Plants, 59 Fed. Reg. 38,889, 38,891 (August 1, 1994). In using the findings of this analysis to develop the vehicle-bomb rule, the NRC took a qualitative approach to assessing the probability of a vehicle-bomb event.

In the preamble to the rule, the Commission explicitly recognized that even if the likelihood of terrorist or insane acts cannot be quantified, they may not be ignored:

> Over the past several years, a number of National Intelligence Estimates have been produced addressing the likelihood of nuclear terrorism. The analyses and conclusions are not presented in terms of quantified probability but recognize the unpredictable nature of terrorist activity in terms of likelihood. The NRC continues to believe that, although in many cases considerations of probabilities can provide insight into the relative risk of an event, in some cases it is not possible, with current knowledge and methods, to usefully quantify the probability of a specific vulnerability threat.
>
> The NRC notes that, although not quantified, its regulatory analysis recognizes the importance of the

> perception of the likelihood of an attempt to create radiological sabotage in assessing whether to redefine adequate protection. The NRC's assessment that there is no indication of an actual vehicle threat against the domestic commercial nuclear industry was an important consideration in concluding that neither the Three Mile Island intrusion nor the World Trade Center bombing demonstrated a need to redefine adequate protection.
>
> The NRC does not agree that quantifying the probability of an actual attack is necessary to a judgment of a substantial increase in overall protection of the public health and safety (a less stringent test of the justification of for a rule change). Inherent in the NRC's current regulations is a policy decision that the threat, although not quantified, is likely in a range that warrants protection against a violent external assault as a matter of prudence.

59 Fed. Reg. at 38,890-9 (emphasis added). The NRC further elaborated on what it meant by its use of the term "likely," by identifying several factors that make up the "domestic threat environment," and noting the degree to which it had changed in recent years:

> The vehicle bomb attack on the World Trade Center represented a significant change to the domestic threat environment that * * * eroded [our prior] basis for concluding that vehicle bombs could be excluded from any consideration of the domestic threat environment. For the first time in the United States, a conspiracy with ties to Middle East extremists clearly demonstrated the capability and motivation to organize, plan and successfully conduct a major vehicle bomb attack. Regardless of the motivations or connections of the conspirators, it is significant that the bombing was organized within the United States and implemented with materials obtained on the open

> market in the United States. Accordingly, the Commission believes that the threat characterized in the final rule is appropriate.

Id., 59 Fed. Reg. at 38891. These same considerations continue to apply in the post-September 11 environment, and indeed are all the more persuasive of a sea change in the "domestic threat environment." Thus, motive, capacity, and the pattern of past incidents are relevant to a qualitative analysis.

The vulnerability of the Diablo Canyon ISFSI to potential acts of malice or insanity is evident from the facility's design parameters. These parameters encompass only comparatively minor threats to cask integrity, such as the impact of a tornado-driven automobile at 33 miles per hour, or the explosion of a vehicle fuel tank at a distance of 50 feet. *See* SAR, Section 3.4. Destructive acts of malice or insanity at this facility could employ much more powerful instruments, such as anti-tank ordnance or an impacting aircraft. A significant release of radioactive material could arise from the use of such instruments. This release could contaminate a large area of land, leading to substantial impacts to public health, the natural environment, and the regional economy.

The ER should provide a full discussion of the potential consequences of a range of credible events involving destructive acts of malice or insanity against the proposed ISFSI. It should also evaluate a range of reasonable alternatives to the proposed action, including dispersal of casks, protection of casks by berms or bunkers, and use of more robust storage casks than the Holtec HI-STORM 100 cask.

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS

A. Selected Provisions of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4437

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in

accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

* * * * *

B. Selected Provisions of Council on Environmental Quality Regulations, 40 C.F.R. §§ 1500.1-1518.4

PART 1500 – PURPOSE, POLICY, AND MANDATE

1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

PART 1501 – NEPA AND AGENCY PLANNING

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

PART 1502 – ENVIRONMENTAL IMPACT STATEMENT

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, "reasonably foreseeable" includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

PART 1508 – TERMINOLOGY AND INDEX

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be

prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

C. Selected Provisions of U.S. Nuclear Regulatory Commission Regulations, 10 C.F.R. Part 51, titled "Environmental protection regulations for domestic licensing and related regulatory functions"

§ 51.25 Determination to prepare environmental impact statement or environmental assessment; eligibility for categorical exclusion.

Before taking a proposed action subject to the provisions of this subpart, the appropriate NRC staff director will determine on the basis of the criteria and classifications of types of actions in §§ 51.20, 51.21 and 51.22 of this subpart whether the proposed action is of the type listed in § 51.22(c) as a categorical exclusion or whether an environmental impact statement or an environmental assessment should be prepared. An environmental assessment is not necessary if it is determined that an environmental impact statement will be prepared.

ENVIRONMENTAL ASSESSMENT

§ 51.30 Environmental assessment.

(a) An environmental assessment shall identify the proposed action and include:

(1) A brief discussion of:

(i) The need for the proposed action;

(ii) Alternatives as required by section 102(2)(E) of NEPA;

(iii) The environmental impacts of the proposed action and alternatives as appropriate; and

(2) A list of agencies and persons consulted, and identification of sources used.

(b) Unless otherwise determined by the Commission, an environmental assessment will not include discussion of any aspect of the storage of spent fuel within the scope of the generic determination in § 51.23(a) and in accordance with the provisions of § 51.23(b).

(c) An environmental assessment for a proposed action regarding a monitored retrievable storage installation (MRS) will not address the need for the MRS or any alternative to the design criteria for an MRS set forth in section 141(b)(1) of the Nuclear Waste Policy Act of 1982 (96 Stat. 2242, 42 U.S.C. 10161(b)(1)).

§ 51.31 Determinations based on environmental assessment.

Upon completion of an environmental assessment, the appropriate NRC staff director will determine whether to prepare an environmental impact statement or a finding of no significant impact on the proposed action. As provided in § 51.33, a determination to prepare a draft finding of no significant impact may be made.

FINDING OF NO SIGNIFICANT IMPACT

§ 51.32 Finding of no significant impact.

(a) A finding of no significant impact will:

(1) Identify the proposed action;

(2) State that the Commission has determined not to prepare an environmental impact statement for the proposed action;

(3) Briefly present the reasons why the proposed action will not have a significant effect on the quality of the human environment;

(4) Include the environmental assessment or a summary of the environmental assessment. If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference;

(5) Note any other related environmental documents; and

(6) State that the finding and any related environmental documents are available for public inspection and where the documents may be inspected.

§ 51.33 Draft finding of no significant impact; distribution.

(a) As provided in paragraph (b) of this section, the appropriate NRC staff director may make a determination to prepare and issue a draft finding of no significant impact for public review and comment before making a final determination whether to prepare an environmental impact statement or a final finding of no significant impact on the proposed action.

(b) Circumstances in which a draft finding of no significant impact may be prepared will ordinarily include the following:

(1) A finding of no significant impact appears warranted for the proposed action but the proposed action is (i) closely similar to one which normally requires the preparation of an environmental impact statement, or (ii) without precedent; and

(2) The appropriate NRC staff director determines that preparation of a draft finding of no significant impact will further the purposes of NEPA.

(c) A draft finding of no significant impact will (1) be marked "Draft", (2) contain the information specified in § 51.32, (3) be accompanied by or include a request for comments on the proposed action and on the draft finding within thirty (30) days, or such longer period as may be specified in the notice of the draft finding, and (4) be published in the FEDERAL REGISTER as required by §§ 51.35 and 51.119.

(d) A draft finding will be distributed as provided in § 51.74(a). Additional copies will be made available in accordance with § 51.123.

(e) When a draft finding of no significant impact is issued for a proposed action, a final determination to prepare an environmental impact statement or a final finding of no significant impact for that action shall not be made until the last day of the public comment period has expired.

§ 51.34 Preparation of finding of no significant impact.

(a) Except as provided in paragraph (b) of this section, the finding of no significant impact will be prepared by the NRC staff director authorized to take the action.

(b) When a hearing is held on the proposed action under the regulations in subpart G of part 2 of this chapter or when the action can only be taken by the Commissioners acting as a collegial body, the appropriate NRC staff director will prepare a proposed finding of no significant impact which may be subject to modification as a result of review and decision as appropriate to the nature and scope of the proceeding. In such cases, the presiding officer, the Atomic Safety and Licensing Appeal Board, or the Commission acting as a collegial body, as appropriate, will issue the final finding of no significant impact.

§ 51.35 Requirement to publish finding of no significant impact; limitation on Commission action.

(a) Whenever the Commission makes a draft or final finding of no significant impact on a proposed action, the finding will be published in the FEDERAL REGISTER as provided in § 51.119.

(b) Except as provided in § 51.13, the Commission shall not take the proposed action until after the final finding has been published in the FEDERAL REGISTER.

Supreme Court, U.S.
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(3)

No. 06-466

IN THE

Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner,

v.

SAN LUIS OBISPO MOTHERS FOR PEACE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

OPPOSITION BRIEF OF RESPONDENTS SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, AND PEG PINARD

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December 2006

QUESTIONS PRESENTED

1. Did the Ninth Circuit correctly hold that the National Environmental Policy Act requires the Nuclear Regulatory Commission, when licensing a radioactive fuel storage facility, to consider the environmental impacts of an act of terrorism against the facility, where the Commission's own policies and procedures demonstrated that it considered a terrorist act to be reasonably foreseeable?

2. Did the Ninth Circuit correctly hold that the Nuclear Regulatory Commission's asserted inability to quantify the risk of a terrorist attack did not excuse it from performing a qualitative analysis?

CORPORATE DISCLOSURE STATEMENT

San Luis Obispo Mothers for Peace ("SLOMFP") and the Sierra Club are non-profit corporations. Neither SLOMFP nor the Sierra Club has any parent company and/or subsidiary or affiliate that has issued shares to the public.

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INTRODUCTION

In the case below, *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006) ("*Mothers for Peace*"), the U.S. Court of Appeals for the Ninth Circuit ruled that in licensing nuclear facilities, the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") categorical refusal to consider the environmental impacts of intentional attacks on those facilities in an environmental impact statement or environmental assessment violates the National Environmental Policy Act. Applying basic principles of proximate causation established in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) ("*Metropolitan Edison*"), and *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) ("*Public Citizen*"), the Ninth Circuit found there was a close causal connection between the NRC's licensing action and a physical impact to the environment and that the likelihood of a terrorist attack was reasonably foreseeable. The Ninth Circuit also found that any assertion that the causal connection was remote, speculative or uncertain was contradicted by the NRC's own exercise, in other contexts, of its regulatory authority and responsibility to prevent or mitigate the effects of terrorist attacks. Petitioner Pacific Gas & Electric Company's ("PG&E's") claim that the Ninth Circuit "spurned" the proximate cause doctrine as set forth in *Metropolitan Edison* and *Public Citizen* (Petition for Certiorari ("Pet.") at 1) has no basis.

Likewise, PG&E's claim that *Mothers for Peace* conflicts with the NEPA causation analyses of other circuits is unfounded. *Mothers for Peace* applies the proximate cause doctrine to proposed environmental impacts in a manner consistent with the decisions of other circuits. Although significant factual distinctions make the specific holdings of these cases inapplicable to *Mothers for Peace*, nothing about their analyses of NEPA causation contradicts the reasoning of *Mothers for Peace*. With respect to the issues of quantifica-

tion and burden of proof, PG&E simply mischaracterizes the holdings of the allegedly conflicting precedent.

Finally, PG&E's request that the Court review the policy implications of *Mothers for Peace* is inappropriate and premature. In remanding this case to the NRC, the Court of Appeals gave the agency broad latitude regarding the manner in which it may revisit its previous policy of categorically refusing to consider the environmental impacts of intentional attacks on nuclear facilities. PG&E may find the NRC's actions on remand to be reasonable, and its dire predictions regarding the effects of *Mothers for Peace* on NRC decision-making may not come to pass. The government's own failure to seek review of the Ninth Circuit's decision strongly indicates that the NRC – the agency responsible for carrying out the Court's decision – is prepared to carry out the remand and does not regard the obligations imposed on it by the Ninth Circuit as involving burdens so great as to demand this Court's intervention.[1]

STATEMENT OF THE CASE

A. The National Environmental Policy Act

Through the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321-4370f, Congress established a "national policy [to] encourage productive and enjoyable harmony between man and his environment." *Public Citizen*, 541 U.S. at 756 (quoting 42 U.S.C. § 4321). Before taking actions that may have a significant impact on the human environment, NEPA requires federal agencies to prepare envi-

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[1] In addition to not seeking review itself, the NRC has waived any entitlement it would otherwise have to support PG&E's Petition by seeking an extension of time to file a response to the petition. Under this Court's rules, a respondent who wishes to file a response supporting a petition for certiorari must do so within 20 days of the docketing of the petition, and the time for filing such a brief "will not be extended." S. Ct. R. 12.6.

ronmental impact statements ("EISs") that carefully consider the environmental impacts of proposed decisions and alternatives for reducing or avoiding those impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); 10 C.F.R. § 51.71(d).

EISs must consider environmental impacts that are "reasonably foreseeable" and have "catastrophic consequences, even if their probability of occurrence is low." 40 C.F.R. § 1502.22(b)(1). Environmental impacts that are "remote and speculative" need not be considered, however. *Limerick Ecology Action v. NRC*, 869 F.2d 719, 745 (3d Cir. 1989) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978)). Moreover, a "reasonably close causal connection" must exist between the proposed agency action and the environmental effects of concern. *Public Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774).

That the likelihood of an impact may not be easily quantifiable is not an excuse for failing to address it in an EIS. Indeed, the NRC's own regulations require that "[t]o the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms." 10 C.F.R. § 51.71(d).

Where it is not clear whether the impacts of a proposed action are significant, the agency may provide a more limited document, an environmental assessment ("EA") that "[b]riefly provides[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." *Public Citizen*, 541 U.S. at 757 (quoting 40 C.F.R. § 1508.9(a)). If, after preparing an EA, the agency determines that an EIS is not required, it must issue a "finding of no significant impact" which states the reasons for the determination. *Id.* (quoting 40 C.F.R. §§ 1501.4(e), 1508.13).

B. Administrative Proceeding

PG&E is running out of storage space for the "spent" or used fuel generated by the two nuclear reactors on the site of the Diablo Canyon nuclear power plant. Thus, in late 2001, PG&E applied to the NRC for a license for a new facility to store spent fuel on the Diablo Canyon site in dry storage casks. As allowed by NRC regulations, respondents San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard (collectively, "SLOMFP") requested a hearing on the adequacy of PG&E's license application in the summer of 2002.

Among other things, SLOMFP contended that the application was inadequate to satisfy NEPA because it did not address the environmental impacts of terrorist attacks on the proposed spent fuel storage facility. Pet. App. 6a, 21a-22a. Citing the NRC's increased preparedness in response to the September 11, 2001, attacks, and other assaults on U.S. facilities during the past ten years, SLOMFP argued that the NRC's own conduct shows that it considers such attacks to be reasonably foreseeable. *Id.*

The NRC denied SLOMFP's hearing request, relying on a previous decision in which it had held as a matter of law that it was not required to consider the environmental impact of intentional attacks on nuclear facilities. *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-01, 57 NRC 1 (2003) (Pet. App. 32a) (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002) (Pet. App. 42a)). According to the NRC, no EIS was required because: (a) the possibility of a terrorist attack is too far removed from the natural or expected consequences of agency action to require study under NEPA, (b) the risk of a terrorist attack cannot be meaningfully analyzed because it cannot be determined quantitatively, (c) NEPA does not require a "worst-case" analysis, and (d) NEPA's public process is not an appropriate forum for sensitive security issues. Pet. App. 38a-39a.

C. The Decision Below

In December 2003, SLOMFP sought review of the NRC's decision in the Ninth Circuit. PG&E was not named as a respondent but intervened to support the NRC's actions. On June 2, 2006, the court granted SLOMFP's petition for review with respect to its NEPA claim.[2] Examining each of the four rationales offered by the NRC in *Private Fuel Storage,* the Ninth Circuit ruled that "the NRC's determination that NEPA does not require a consideration of the environmental impact of terrorist attacks does not satisfy reasonableness review." Pet. App. 31a.

First, the court evaluated issues of proximate causation, finding a reasonably close causal link between the NRC's licensing of the spent fuel storage facility and the physical impacts of a terrorist attack. Pet. App. 20a. The court also found that the NRC had failed to support its assertion that the likelihood of terrorist attacks is remote and speculative, and that the NRC's own preparations for terrorist attacks, through its regulatory actions, policies and procedures, undercut its position that terrorist attacks are not reasonably foreseeable under NEPA. *Id.* at 21a-24a.

Second, the court ruled that NEPA does not allow the NRC to ignore the environmental impacts of terrorist attacks simply because their likelihood cannot be quantified. The court also found that the NRC's own actions show it is capable of making a meaningful assessment of the likelihood of terrorist attacks. Pet. App. 24a-26a.

Third, the Ninth Circuit rejected the NRC's assertion that SLOMFP sought a "worst-case" analysis not required by NEPA. Pet. App. 26a-29a. As the court observed, SLOMFP did not "seek to require the NRC to analyze the most extreme (i.e., the 'worst') possible environmental impacts of a terror-

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[2] SLOMFP's non-NEPA claims before the Ninth Circuit are not on review here.

ist attack." *Id.* at 29a. Instead, SLOMFP sought "an analysis of the range of environmental impacts likely to result in the event of a terrorist attack" on the dry storage facility. *Id.*

Finally, the Ninth Circuit rejected as unreasonable the NRC's claim that "it cannot comply with its NEPA mandate because of security risks." Pet. App. 29a-30a. The court found that while security considerations may permit or require modifications of some NEPA procedures to protect sensitive information, NEPA contains no waiver or exemption for security or defense-related issues. *Id.* (citing *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project,* 454 U.S. 139 (1981)).

The court remanded the case to the NRC "to fulfill its responsibilities under NEPA," giving the NRC wide latitude with respect to both merits and procedures. Pet. App. 31a. The court also expressed confidence that given the NRC's long experience dealing with "our nation's most sensitive nuclear secrets," it would "analyze the questions raised by the petition in an appropriate manner consistent with national security." *Id.* Under the court's remand order, as under NEPA itself, the obligation to comply with NEPA is placed only upon the NRC, and not upon PG&E. The NRC not only did not request a stay of the remand order, but also failed to seek further review either by the en banc Ninth Circuit or by this Court.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS.

A. The Alleged Conflict With Precedents of This Court Does Not Exist.

In *Metropolitan Edison* and *Public Citizen,* this Court applied the doctrine of proximate cause to hold that NEPA requires a "'reasonably close causal relationship' between the environmental effect and the alleged cause." *Public Citizen,*

541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774). Those cases establish two requirements for satisfying the causal relationship standard: the alleged environmental harm must have a reasonably close connection to an actual physical impact on the environment (*Metropolitan Edison*, 460 U.S. at 776-77), and the agency in question must have authority and responsibility to use the NEPA process to prevent or mitigate the environmental harm. *Public Citizen*, 541 U.S. at 769-70. Consistent with *Metropolitan Edison* and *Public Citizen*, in *Mothers for Peace*, the Ninth Circuit found that both of these requirements were met in assessing whether the environmental impacts of terrorist attacks have a reasonably close causal connection to the licensing of the Diablo Canyon spent fuel storage facility.

The Ninth Circuit first considered the causal connection between the NRC's action and impacts to the environment, and found a close relationship between the licensing of the spent fuel storage facility and the direct physical impacts to the environment of a terrorist-induced nuclear accident. Pet. App. 20a-21a. The court distinguished the physical environmental impacts that would result if the risk of a terrorist attack were realized from the "attenuated," non-environmental impacts of psychological illness caused by the "unrealized risk" of a nuclear accident that were at issue in *Metropolitan Edison*. *Id.* at 20a-21a (citing *Metropolitan Edison*, 460 U.S. at 775 n.9).

As required by *Public Citizen*, the Ninth Circuit also examined the relationship between the impacts of terrorist attacks and the NRC's regulatory authority and responsibility, and found an unacceptable inconsistency between the NRC's pronouncements that terrorist attacks are "remote and speculative" and its "policy statements and procedures" that make preparations for a terrorist attack a high priority. Pet App. 22a-24a. In contrast to the Federal Motor Carrier Safety Administration ("FMCSA") in *Public Citizen*, which had neither caused the environmental impacts at issue nor could con-

trol them, 541 U.S. at 767-68, the NRC is directly responsible for protecting human health and the environment against the effects of a terrorist attack on its licensed facilities. Moreover, in contrast to *Public Citizen,* the court in *Mothers for Peace* established that the "policy goals of NEPA" would be served by requiring NRC to consider the environmental impacts of terrorist attacks in an EA or EIS. Pet. App. 24a. Thus, the Ninth Circuit established the connection between the impacts and the actions of the responsible agency that was missing in *Public Citizen.*

In addition, the Ninth Circuit went on to assess whether there was sufficient proximate cause in another respect that was not at issue in *Metropolitan Edison* and *Public Citizen*: whether the likelihood of environmental impacts is reasonably foreseeable or too "remote and speculative" from the agency action to require study under NEPA. Pet. App. 21a (quoting *NoGWEN Alliance v. Aldridge,* 855 F.2d 1380 (9th Cir. 1988)).[3] In evaluating this fact-based element of proximate causation, the Ninth Circuit held unreasonable the NRC's failure to respond to SLOMFP's factual contentions that the presence of the spent fuel storage facility would lead to or increase the potential for a terrorist attack, because the presence of the spent fuel storage facility would increase the potential for an attack on the Diablo Canyon nuclear plant, and because the storage facility itself would be a primary tar-

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[3] PG&E asserts that the *NoGWEN* reasonable foreseeability standard is somehow at odds with the proximate cause requirement of *Metropolitan Edison* and *Public Citizen.* Pet. 13-14. But as PG&E recognizes, the doctrine of proximate cause "embraces the concepts of certainty, foreseeability, and probability, in addition to public policy considerations germane to the issue of legal responsibility." Pet. 13 n.2, citing *Holmes v. Sec. Investor Prot. Corp.,* 503 U.S. 258, 268 (1992); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 264, 274-75 (5th ed. 1984). Thus, *NoGWEN*'s analysis is not inconsistent with a proximate cause standard; rather, it is an integral part of the proximate cause standard.

get for a terrorist attack. *Id.* at 24a. The court also found that the NRC's own actions in preparation for a September 11-style attack show that it considers such attacks to be a reasonably foreseeable consequence of its licensing action. *Id.* at 22a-24a.

Thus, applying the proximate cause doctrines of *Metropolitan Edison* and *Public Citizen,* the Ninth Circuit rejected as unreasonable the NRC's claim that terrorists, not NRC licensing decisions, constitute the proximate cause of terrorist attacks on nuclear facilities. Contrary to PG&E's argument (Pet. 13), this holding presents no conflict with *Metropolitan Edison* or *Public Citizen.*

B. The Alleged Conflict Among the Circuits Does Not Exist.

1. Causation decisions do not conflict.

Each of the circuit cases cited by PG&E in its Petition applies the proximate cause doctrine to proposed environmental impacts in a manner consistent with *Mothers for Peace, Metropolitan Edison* and *Public Citizen.* Each case is also distinct from *Mothers for Peace* with respect to its circumstances, and thus in no case does the holding apply to the circumstances of *Mothers for Peace* or conflict with the Ninth Circuit's ruling.

In *Glass Packaging Institute v. Regan*, 737 F.2d 1083 (D.C. Cir.), *cert. denied*, 469 U.S. 1035 (1984) (*"Glass Packaging"*), *overruled in part on other grounds, Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 283 n.2 (D.C. Cir. 1988), the D.C. Circuit held that in proposing to allow the packaging of liquor in plastic bottles, the Bureau of Alcohol, Tobacco and Firearms was not required to address the environmental impacts of criminal tampering with the plastic bottles. *Id.* at 1091. The court found that "no cognizable environmental effect is implicated by the introduction of a new plastic container into the market place merely because it may be susceptible to tampering." *Id.*

Like *Metropolitan Edison, Glass Packaging* involved circumstances in which the alleged impact (the possibility that drinkers might be poisoned) was not causally related to any physical effect on the environment. In the case of *Metropolitan Edison,* the risk of a nuclear accident had no physical manifestation in the environment, and thus the Court decided the resulting impacts of psychological illness were too "attenuated" to warrant NEPA review. Similarly, in *Glass Packaging,* the introduction of a new type of plastic bottle to the marketplace, by itself, had no physical impacts to the environment, and thus the Court declined to extend NEPA's scope to the impacts that would result from tampering with the otherwise-benign bottles. Here, in contrast, SLOMFP is concerned about the potentially grave physical environmental impacts that would flow directly from the operation of the Diablo Canyon spent fuel storage facility if the spent fuel storage containers were breached in a terrorist attack. Pet. App. 21a. Thus *Mothers for Peace* constitutes an "entirely different case" from the circumstances of *Glass Packaging* or *Metropolitan Edison. Id.* at 20a (quoting *Metropolitan Edison,* 460 U.S. at 775 n.9).

Moreover, in *Glass Packaging* the responsible agency, the Food and Drug Administration, had evaluated the risk of tampering by injection through plastic-walled drug containers and found it to be insignificant, thus demonstrating that risks of tampering with similar beverage containers would not necessarily require an EIS. 737 F.2d at 1092. Here, in contrast, the NRC has acknowledged the risks of terrorist attacks on licensed nuclear facilities, "insist[ing] on its preparedness and the seriousness with which it is responding to the post-September 11th terrorist threat." Pet. App. 23a.

Similarly, the Second Circuit's decision in *City of New York v. U.S. Department of Transportation,* 715 F.2d 732 (2d Cir. 1983) ("*City of New York*"), raises no conflict with *Mothers for Peace.* In *City of New York,* the Second Circuit reversed a district court decision requiring the U.S. Depart-

ment of Transportation ("DOT") to prepare an EIS in support of regulations that would govern the safety of radioactive waste shipments through New York City and its environs. The Court affirmed DOT's conclusion that "the risks of sabotage were too far afield for consideration." 715 F.2d at 750.

Contrary to PG&E's argument (Pet. 17), the Second Circuit's use of the phrase "too far afield" does not imply that the court held as a matter of law that the causal connection between an agency's action and the environmental impacts of sabotage or terrorism would always be too weak to support application of NEPA. No such analysis can be found in the decision, and, indeed, the causal connection was not questioned in the decision. Instead, the phrase "too far afield" refers to the DOT's factual conclusion (reached in reliance on the NRC) that, at that time, the environmental consequences of terrorist attacks on plutonium shipments through New York City were only "remote possibilities" posing an "unascertainable risk." 715 F.2d at 750. Under NEPA, such a fact-based conclusion may not be relied on as an unimpeachable precedent for all time, but must be reconsidered in new circumstances and in light of new and significant information. *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 374 (1989).[4] As the Ninth Circuit observed in *Mothers for Peace,* recent NRC pronouncements demonstrate that as a factual matter, the NRC no longer considers inten-

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[4] *See also Limerick Ecology Action, Inc. v. NRC,* 869 F.2d 719 (3d Cir. 1989), as discussed at page 15 below. Notably, in the context of reviewing a post-9/11 enforcement case brought under the Atomic Energy Act, the Second Circuit recently stated in dicta that because of changed circumstances it would no longer be "compelled" to follow a past decision approving the NRC's refusal to require "a showing of effective protection against . . . the possibilities of attack or sabotage by foreign enemies." *Riverkeeper, Inc, v. Collins,* 359 F.3d 156, 168 n.14 (2d Cir. 2004)(citing *Siegel v. Atomic Energy Commission,* 400 F.2d 778, 779 (D.C. Cir. 1968)).

tional attacks to be "remote possibilities," but now anticipates and carefully plans for them. Pet. App. 22a-24a.

Finally, there is no conflict between *Mothers for Peace* and *Mid States Coalition for Progress v. Surface Transportation Board,* 345 F.3d 520 (8th Cir. 2003) ("*Mid States Coalition*"). In Mid States Coalition, the Eighth Circuit upheld the Surface Transportation Board's ("STB's") refusal to grant a motion to re-open a railroad construction permit proceeding in order to evaluate the implications of a Maryland derailment of a train carrying toxic materials and the September 11 attacks with respect to the difficulty of immediately evacuating the Mayo Clinic. No question was raised regarding the causal connection between the railroad construction project and terrorist attacks. Instead, the court upheld the STB's factual conclusions that shipment of hazardous materials on the proposed line was "unlikely" and that the Maryland derailment and the September 11 attacks did not pose "a threat specific to Mayo." 345 F.3d at 543-44.

PG&E argues that if the Ninth Circuit had applied *Mid States Coalition* to the instant case, "it would have been forced to concede as a matter of law that the 'increased threat' of terrorism was a 'general' threat that 'does not bear specifically on the [PG&E] project,'" and therefore would have concluded that "NEPA's requirements were *not* triggered." Pet. 18 (emphasis in original). But the question whether a terrorist threat is general or site-specific is a factual one that must take into consideration the specific circumstances of each case. In *Mothers for Peace,* the court found that the NRC had ignored SLOMFP's "factual contentions that licensing the Storage installation would lead to or increase the risk of a terrorist attack." Pet. App. 21a. Thus *Mid*

States Coalition presents a different set of facts rather than a conflict.[5]

2. Decisions on quantification and burden of proof do not conflict.

Rather than conflicting with *Mothers for Peace, Limerick Ecology Action, Inc. v. NRC,* 869 F.2d 719 (3d Cir. 1989) ("*Limerick*") supports *Mothers for Peace*'s holding that "[n]o provision of NEPA, or any other authority cited by the Commission, allows the NRC to eliminate a possible environmental consequence from analysis by labeling the risk as 'unquantifiable.'" Pet. App. 25a. The Ninth and Third Circuits agree that the "mere assertion of unquantifiability" does not immunize the NRC from consideration of environmental impacts under NEPA. 869 F.2d at 744 n.31.[6] Indeed, both decisions are compelled by the NRC's own regulations, which provide that:

> The analysis for all draft environmental impact statements will, to the *fullest extent practicable*, quantify the various factors considered. *To the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms.*

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[5] Nor does *City of Shoreacres v. Waterworth,* 520 F.3d 440, 451-53 (5th Cir. 2005), cited in PG&E's Pet. 18 n.5, contradict *Mothers for Peace.* In that case, the Fifth Circuit cited *Public Citizen* for the proposition that one government agency may not be held responsible for environmental impacts that are controlled by another. That proposition is not at issue in *Mothers for Peace.*

[6] The dissenting opinion of Judge Scirica, quoted in *Mothers for Peace,* also agreed with the majority on this point, 869 F.2d at 754-55, so PG&E's criticism of the Ninth Circuit for quoting the dissent rather than the majority opinion is particularly unwarranted.

10 C.F.R. § 51.71 (emphasis added).[7]

Nor does the Ninth Circuit's placement of the burden of proof on the NRC rather than SLOMFP conflict with *Limerick*. PG&E confuses the burden of proof with the burden of going forward. Pet. 22. As a general rule, in NRC licensing cases, the applicant bears the burden of proof. 10 C.F.R. § 2.325; *Louisiana Energy Services* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 338 (1996), reversed on other grounds, CLI-98-3, 47 NRC 77 (1998). In NEPA cases, the burden of proof shifts to the NRC. *Id.* (citing *Duke Power Company* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983)).

NRC regulations also place a burden of going forward on parties who seek to challenge license applications or NRC

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[7] PG&E errs in asserting that *Limerick* and *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87 (1983) ("*Baltimore Gas & Electric*") required the Ninth Circuit to give a high level of deference to the NRC's determination that the potential for terrorist attacks is not capable of meaningful assessment. Pet. 21-22. In *Limerick*, the Third Circuit deferred to the NRC's "scientific determination" that the risks of a sabotage event could not be assessed, where the petitioner had failed to rebut it by proposing a "meaningful method by which the NRC could either assess or predict sabotage risks." 869 F.2d at 743-44, citing *Baltimore Gas & Electric*, 462 U.S. at 104. Here, in contrast, the NRC simply declared that "the possibility of a terrorist attack . . . is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA" as a "matter of law," and without factual support. Pet App. 21a (quoting *Private Fuel Storage*, Pet. App. 54a). Moreover, the NRC failed to respond to SLOMFP's factual contentions challenging its determination. *Id.* The Ninth Circuit correctly held that a "reasonableness" test is appropriate, rather than "the strong level of deference we accord an agency in deciding factual or technical matters." Pet App. 17a-18a (citing *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995), *Makani'o Kohala Ohana, Inc. v. Water Supply*, 295 F.3d 955, 959 n.3 (9th Cir. 2002)).

determinations in a hearing. 10 C.F.R. § 2.309(f).[8] In *Limerick,* the Third Circuit found the petitioner had not met its burden of going forward with evidence to rebut the NRC's determination that the risks of sabotage could not be assessed, and therefore the petitioner could not obtain a hearing on whether the NRC should revisit its conclusion. 869 F.2d at 743-44. The Third Circuit did not shift the ultimate burden of proof from the NRC to the petitioners, and it acknowledged that the NRC's determination that the threat could not be assessed must be supported by the record. *Id.* at 743.

In fact, in another part of its decision, the Third Circuit found that the NRC had not met its burden of justifying its assertion that severe nuclear power plant accidents are remote and speculative in light of the results of "extensive research projects undertaken by the Commission concerning nuclear accidents." 869 F.2d at 738-40. Noting that "NRC defined serious accidents as remote and speculative before the partial core melt at Three Mile Island," *id.* at 739 n.24, the Third Circuit was "troubled" by the NRC's "seeming insistence on defining serious risks as remote and speculative, hence not considering their environmental impacts, until experience proves the Commission wrong." *Id.* at 740 n.6. Similarly, in this case the NRC's own regulatory actions and policies fatally undermine its position that terrorist attacks are remote and speculative.

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[8] The regulation was formerly codified at 10 C.F.R. 2.714(b). *See also Louisiana Power* and *Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983).

II. PG&E'S POLICY OBJECTIONS TO THE NINTH CIRCUIT'S RULING ARE UNWARRANTED SPECULATIONS, RAISING NO IMPORTANT QUESTIONS OF LAW.

PG&E's non-legal objections to the Ninth Circuit's decision, which it frames as policy concerns regarding national security consequences and practical concerns over expeditious processing of nuclear facility licenses, do not raise an "important question of federal law" warranting review by this Court. Sup. Ct. R. 10(c). Further, PG&E's parade-of-horribles speculations are unsupported by the administrative record, particularly as to national security concerns.[9]

The Ninth Circuit's remand gave the NRC substantial discretion as to how best to perform NEPA review of intentional attacks on nuclear facilities. The court noted the NRC's considerable expertise in establishing procedures for the handling of sensitive information, observing that the agency "has dealt with our nation's most sensitive nuclear secrets for many decades." Pet. App. 31a. The court also expressly authorized the NRC to modify NEPA procedures as necessary in view of any security risks. *Id.* If consequences for national security generally and nuclear licensing specifically were remotely as grave as PG&E suggests, it is surprising that the agency directly affected – the Nuclear Regulatory Commission – has not filed a petition for certiorari in this Court.

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[9] PG&E itself publicly stated in the wake of the Ninth Circuit's opinion that the ruling would not delay construction of the storage facility. *See* David Sneed, "Court Orders Diablo Terror Analysis," San Luis Obispo Tribune (June 2, 2006) ("Diablo Canyon officials said the ruling does not affect the operation of the plant and will not delay construction of the dry cask storage facility.") A copy of the article is available at http://www.topix.net/content/kri/322606995901267280724123737322625634132.

CONCLUSION

For the foregoing reasons, PG&E's petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 06-466

In the Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY, PETITIONER

v.

SAN LUIS OBISPO MOTHERS FOR PEACE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, requires the Nuclear Regulatory Commission to consider, as part of its review of a proposed federal action, the environmental impact of a potential terrorist attack.

2. Whether the Commission must consider such an impact even if the risk is not sufficiently quantifiable to be meaningful or to assist agency decision making under NEPA.

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is published at 449 F.3d 1016. The order of the Nuclear Regulatory Commission (Pet. App. 32a-41a) is reported at 57 N.R.C. 1.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2006. On August 28, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 29, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agen-

cies to "include in every recommendation or report on * * * major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on * * * the environmental impact of the proposed action." 42 U.S.C. 4332(2)(C)(i). NEPA is a procedural statute that does not mandate substantive results. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989). It is designed "to insure a fully informed and well-considered decision." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

Implementing regulations issued by the Council on Environmental Quality (CEQ) provide that an agency may prepare an environmental assessment (EA), which is a "concise public document" that briefly describes the need for, alternatives to, and environmental impacts of the proposed federal action. 40 C.F.R. 1501.3, 1508.9. If the agency determines, based on the EA, that the proposed federal action will not significantly affect the environment, it can discharge its NEPA duties by making a finding of no significant impact. 40 C.F.R. 1501.4(e), 1508.13. If, however, the agency determines that the proposed action will significantly affect the environment, it must prepare a more thorough environnmental impact statement (EIS) concerning the project. See 40 C.F.R. Pt. 1502.[1]

Under NEPA, an agency must consider an environmental effect of a proposed major federal action if there is a "'reasonably close causal relationship' between the environmental effect and the alleged cause." *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 767

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[1] The Nuclear Regulatory Commission has issued similar regulations of its own. See 10 C.F.R. 51.1 *et seq.*

(2004) (quoting *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). This Court has "analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'" *Ibid.* (quoting *Metropolitan Edison*, 460 U.S. at 774).

b. The Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, authorizes the Nuclear Regulatory Commission (NRC or Commission) to license interim spent fuel storage installations. 42 U.S.C. 2073, 2093, 2111; see 42 U.S.C. 10152. For licensing proceedings, Section 189(a) of the AEA requires NRC to grant a hearing "upon the request of any person whose interest may be affected." 42 U.S.C. 2239(a)(1)(A). A petitioner in a licensing proceeding may submit contentions on issues arising under NEPA. 10 C.F.R. 2.309(f)(2). When appropriate, a three-member panel of the Atomic Safety and Licensing Board (Licensing Board) holds a hearing before issuing a decision. 10 C.F.R. 2.321. A party may petition the Commission for review of the Licensing Board's decision. 10 C.F.R. 2.341.

2. Petitioner applied to NRC for a 20-year license to construct and operate an interim spent fuel storage facility, in addition to its existing storage capacity, at the Diablo Canyon Power Plant in San Luis Obispo, California. Pet. App. 5a. The non-federal respondents and others requested a hearing and argued, *inter alia*, that NEPA required NRC to analyze the potential impacts of a terrorist attack on the facility. *Id.* at 6a-7a. The Licensing Board rejected that contention. *Ibid.*; *Pacific Gas & Elec. Co.*, 56 N.R.C. 413 (2002).

The Commission affirmed. Pet. App. 32a-41a. Relying on agency precedent and *Metropolitan Edison*, NRC determined that "the 'possibility of a terrorist attack * * * is speculative and simply too far removed from

the natural or expected consequences of agency action to require study under NEPA,' which is confined to 'manageable' inquiries." *Id.* at 38a-39a (quoting *Private Fuel Storage L.L.C.*, 56 N.R.C. 340, 349 (2002)). As an alternative ground for its decision, NRC also stated that "the risk of a terrorist attack at a nuclear facility cannot be adequately determined," and that "attempts to evaluate that risk even in qualitative terms are likely to be meaningless and consequently of no use in the agency's decisionmaking." *Id.* at 39a. The Commission noted further that "NEPA does not require a 'worst-case' analysis," and "NEPA's public process is not an appropriate forum for considering sensitive security issues." *Ibid.*

The Commission found that "[s]torage of spent fuel at commercial reactor sites offers no unusual technological challenges. Indeed, it has been occurring at Diablo Canyon for many years and will continue whether or not we license the proposed" expansion of the facility's storage capacity. Pet. App. 40a. The Commission further stressed that although it "decline[d] to consider terrorism in the context of NEPA," it was "devoting substantial time and agency resources to combating the potential for terrorism involving nuclear facilities and materials." *Ibid.*

Subsequently, the Commission declined to review the Licensing Board's final decision authorizing the licensing of the Diablo Canyon spent fuel storage facility. *Pacific Gas & Elec. Co.*, 58 N.R.C. 47, petition for review denied, 58 N.R.C. 185 (2003).

3. The Ninth Circuit remanded to the agency for further proceedings. Pet. App. 1a-31a. As relevant here, the court of appeals held that NRC violated NEPA by failing to analyze the potential impacts of a terrorist attack on the Diablo Canyon facility. *Id.* at 17a-31a.

The court rejected NRC's argument that, under *Metropolitan Edison*, there was not a sufficiently close causal connection between licensing the facility and the environmental impacts of a potential terrorist attack to require analysis under NEPA. *Id.* at 19a-24a. The court found "*Metropolitan Edison* and its proximate cause analogy * * * inapplicable here." *Id.* at 20a.

Instead, the Ninth Circuit determined that "[t]he appropriate inquiry is * * * whether [terrorist] attacks are so 'remote and highly speculative' that NEPA's mandate does not include consideration of their potential environmental effects." Pet. App. 21a. Applying that standard, the court of appeals determined that "it was unreasonable for the NRC to categorically dismiss the possibility of a terrorist attack" on the Diablo Canyon facility as remote and highly speculative, without expressly addressing respondents' "factual contentions that licensing the Storage Installation would lead to or increase the risk of a terrorist attack." *Id.* at 21a-22a. The court also asserted that the Commission's position is inconsistent with its efforts to prevent terrorist attacks on nuclear facilities. *Id.* at 22a-24a.

The court of appeals then rejected the Commission's other reasons for not considering terrorism as part of its NEPA analysis. Pet. App. 24a-30a. In relevant part, the court reasoned that the agency must consider risks even if it cannot quantify them, and that, in any event, the agency had failed "to adequately show that the risk of a terrorist act is unquantifiable." *Id.* at 25a. In remanding to the Commission for further proceedings, the court of appeals stated that its decision "should not be construed as constraining the NRC's consideration of the merits on remand," because "[t]here remain open to

the agency a wide variety of actions it may take." *Id.* at 30a, 31a.

ARGUMENT

The court of appeals' unprecedented holding that NEPA requires analysis of the environmental effects of potential terrorist attacks is wrong, and the court's refusal to apply the "reasonably close causal relationship" test conflicts with decisions of this Court. The federal respondents did not file their own petition for a writ of certiorari, however, because there is no square circuit conflict and it is unclear at this time how burdensome the court of appeals' decision will be, given that the Ninth Circuit did not specify how much analysis it expects the agency to undertake on remand. At a minimum, however, the court's erroneous decision may require NRC to undertake time-consuming procedures and will lead to further litigation, which will risk delaying important licensing decisions. Moreover, the issue will recur in other NRC licensing proceedings subject to review by the Ninth Circuit, and will affect at least some other agencies as well. The federal respondents recommend denying review at this time, recognizing that the issue may warrant this Court's review in the future if a circuit split develops or the Ninth Circuit imposes burdensome requirements in other cases.

1. a. The court of appeals erred in holding that NRC must consider the potential impacts of terrorist attacks as part of its NEPA analyses. See Pet. App. 17a-31a. NRC goes to great lengths to protect the Nation from terrorism, including terrorism directed at nuclear facilities. See p. 9, *infra*. But NEPA has a narrower and different focus. As this Court has explained, the NEPA statute and CEQ's implementing regulations require

federal agencies to analyze only the reasonably foreseeable environmental "effects" of proposed federal actions. *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 763-764 (2004) (citing 40 C.F.R. 1508.8(a) and (b)). Significantly, a "'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." *Id.* at 767; accord *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). Rather, an agency must consider an environmental effect of a proposed federal action only if there is "'a reasonably close causal relationship' between the environmental effect and the alleged cause." *Public Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774). In both *Public Citizen* and *Metropolitan Edison*, this Court "analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'" *Public Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774).

As construed in *Public Citizen* and *Metropolitan Edison*, NEPA does not require NRC to analyze the effects of a potential terrorist attack, because the agency's licensing decision could not be construed as the legal cause of such an attack or its environmental impact. Under the traditional understanding of the proximate cause doctrine of tort law, intervening criminal activity generally breaks the chain of causation. See, *e.g.*, Restatement (Second) of Torts §§ 442, 442B cmt. c, 448 (1965). Here, a terrorist's intentional criminal act of mass murder and destruction, not a licensing decision, would proximately cause a terrorist attack's consequences. Moreover, one does not in any sense cause criminal activity simply by providing an object for a criminal act. No one causes his or her watch to be stolen simply by buying a valuable watch.

The court of appeals' suggestion that NRC's extensive efforts to prevent terrorist attacks are somehow "inconsistent" with its view that NEPA is not implicated focuses on the wrong question. Pet. App. 22a. Under the correct legal standard, the question is not merely whether an attack is likely or worth trying to prevent, but whether NRC's licensing decision would be the proximate *cause* of an attack's consequences. An agency's precautionary choice to protect against a highly improbable event hardly increases the causal connection between the agency's action and the event, much less the likelihood of the event occurring. The Ninth Circuit itself has recognized that such precautionary actions do not trigger a duty to perform NEPA analyses. See, *e.g.*, *Ground Zero Ctr. for Non-violent Action* v. *United States Dep't of the Navy*, 383 F.3d 1082, 1090 (2004).

Moreover, the analogy to tort law is not precise. Courts must "look to the underlying policies or legislative intent in order to draw a manageable line." *Public Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774 n.7). Even if a State's tort-law policy of compensating victims would warrant holding a negligent actor liable for harm caused by a terrorist attack, NEPA's policies do not warrant the requirement imposed by the Ninth Circuit here. The policies underlying NEPA focus on environmental effects within a rule of reason, and they would not be furthered by requiring analysis of terrorism, which is unlikely to occur at any particular facility and poses a threat to the Nation as a whole that is entirely independent of NRC's actions at any particular facility. As this Court emphasized in *Metropolitan Edison*, NEPA's demands must "remain manageable" if its goals are to be met. 460 U.S. at 776. Otherwise, "available resources may be spread so thin

that agencies are unable adequately to pursue protection of the physical environment and natural resources." *Ibid.* Thus, "inherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Public Citizen*, 541 U.S. at 767 (quoting *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 373-374 (1989)).

Requiring NRC to analyze the potential impacts of terrorist attacks under NEPA would be inconsistent with the rule of reason because it would divert agency resources without any corresponding benefit. NRC already goes to great lengths to increase the safety of nuclear facilities, not only to protect the environment, but also because of the catastrophic human consequences that could result from a successful terrorist attack. See Pet. App. 40a, 43a-46a. Following the terrorist attacks of September 11, 2001, NRC ordered licensed nuclear facilities to implement additional security measures beyond those required by regulation. See, *e.g.*, 67 Fed. Reg. 9792 (2002); *id.* at 65,150. NRC has also proposed strengthening its regulations that require nuclear facilities to guard against radiological sabotage and theft or diversion of nuclear material. 70 Fed. Reg. 67,380 (2005). Adding NEPA analysis of potential terrorist attacks to NRC's already extensive regulatory efforts to address that threat would divert agency resources and make NEPA less manageable without producing any useful new information—and would therefore fail to advance NEPA's goal of protecting the environment.[2]

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[2] The court of appeals thus erred in placing reliance on a CEQ regulation stating that an EIS should address events with potentially

Moreover, information concerning the potential consequences of terrorist attacks at individual facilities is sensitive security information. Pet. App. 39a, 62a-65a. As NRC explained, "NEPA does not override [our] concern for making sure that sensitive security-related information ends up in as few hands as practicable." *Id.* at 39a (quoting *Private Fuel Storage*, 56 N.R.C. 340, 355 (2002)). Even if protecting sensitive information in NEPA proceedings is manageable, and even assuming that the sensitivity of security information does not alone excuse compliance with NEPA's analysis requirements if the analysis can be withheld from the public, cf. *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146 (1981); see Pet. App. 29a-30a, analysis of terrorist attacks under

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catastrophic consequences, "even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." Pet. App. 27a (quoting 40 C.F.R. 1502.22(b)(4)). In the first place, the CEQ regulation on its face is inapplicable when an agency is determining whether an EIS is required; it addresses only the content of an EIS once the agency has already determined that one must be prepared. Moreover, Section 1502.22(b)(4) merely addresses reasonable foreseeability as a general matter. It sheds no light on the question whether NEPA analysis is required when the federal action is *not* the legal cause of the relevant effect; nor does it speak to the question whether an intervening criminal act such as a terrorist attack would break the causal connection required by *Metropolitan Edison* and *Public Citizen*. In any event, the regulation would not support the court of appeals' conclusion in this case even if it did apply, because it applies to "low" probability events, not events that are entirely speculative and unpredictable; it requires analysis only if supported by "credible scientific evidence" rather than "pure conjecture," a standard that is not satisfied here; and it is subject to a "rule of reason," which, as explained in the text, does not support a requirement that the threat of terrorist attack be addressed in the NEPA context. See 40 C.F.R. 1502.22(b)(4).

NEPA still creates a risk that sensitive information could be disclosed. That risk reinforces the conclusion that NEPA's rule of reason does not require consideration of terrorist attacks as part of the NEPA process.

b. The Ninth Circuit's erroneous decision conflicts with this Court's decisions in *Metropolitan Edison* and *Public Citizen* because it refuses to apply the "reasonably close causal relationship" standard mandated by those decisions. See Pet. App. 20a-21a. While the court of appeals purported to distinguish *Metropolitan Edison* on the ground that it involved the relationship between a change in the physical environment and an effect, whereas this case involves the relationship between a federal action and a change in the environment, see Pet. App. 20a, that is no distinction at all. In every NEPA case, the question is whether a federal action will cause a significant effect on the environment. Moreover, the court of appeals did not even attempt to distinguish *Public Citizen*, which reiterates, unconditionally, that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause." 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774).

It is true that neither *Metropolitan Edison* nor *Public Citizen* involved the environmental effects of a potential terrorist attack, and as a result, neither of them had occasion to apply the "reasonably close causal relationship" test to such effects. See *Metropolitan Edison*, 460 U.S. at 775 n.9 (noting that the Court did not consider "effects that will occur if * * * an accident occurs"). But the Ninth Circuit's failure even to apply this Court's "reasonably close causal relationship" test was clear error. And under that standard, it is clear that NEPA

analysis of the consequences of terrorist attacks is not required, as discussed above.

c. The Ninth Circuit's decision appears to be unprecedented in requiring a NEPA analysis of the impacts of a potential terrorist attack. But while there is tension in the case law, there is not a square circuit split on that question.

Two circuits have held that agencies were not required to consider terrorist attacks as part of their NEPA analyses. In *Mid States Coalition for Progress* v. *Surface Transportation Board*, 345 F.3d 520 (2003), the Eighth Circuit reviewed the Surface Transportation Board's decision to allow construction of new rail lines. In doing so, the court held that the agency did not err in declining to reopen the record to consider the terrorist attacks of September 11, 2001, because the agency had "exercised its permissible discretion when it determined that any increased threat was general in nature" and did not relate to the specific project at issue. *Id.* at 543, 544. While the Eighth Circuit's conclusion suggests that an agency does not err by declining to consider generalized terrorism concerns, the court relied in part on "the safety analysis already performed by" the agency before the petitioner in that case requested a supplemental analysis. *Id.* at 544. Here, in contrast, NRC did not rely on a particularized safety analysis.

In *City of New York* v. *Department of Transportation*, 715 F.2d 732 (1983), appeal dismissed, cert. denied, 465 U.S. 1055 (1984), the Second Circuit deferred to the Department of Transportation's conclusion that the risks of terrorism or other sabotage "were too far afield for consideration" in the NEPA analysis of a regulation governing shipment of radioactive material by highway. *Id.* at 750. Like the Eighth Circuit in *Mid States Coali-*

tion for Progress, however, the Second Circuit found that the Department of Transportation's conclusion was "justified by the record," *ibid.*, while in this case the Ninth Circuit found that NRC erred by making a categorical determination as a matter of law without addressing the non-federal respondents' factual contentions, Pet. App. 21a-22a.[3]

The D.C. Circuit has recognized that "mere foreseeability does not trigger a duty to consider an alleged environmental effect" caused by criminal tampering. *Glass Packaging Inst.* v. *Regan*, 737 F.2d 1083, 1091, cert. denied, 469 U.S. 1035 (1984). In that case, the court of appeals held that the Bureau of Alcohol, Tobacco and Firearms did not have to analyze under NEPA the potential impacts of criminal tampering when considering whether to allow liquor to be sold in plastic bottles. *Id.* at 1091-1092. While the D.C. Cir-

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[3] The court of appeals overstated the categorical nature of the Commission's decision. NRC explained that "[s]torage of spent fuel at commercial reactor sites offers no unusual technological challenges. Indeed, it has been occurring at Diablo Canyon for many years and will continue whether or not we license the proposed" interim spent fuel storage installation. Pet. App. 40a. Moreover, NRC specifically assessed the risks of a terrorist attack, and concluded that "the possibility of a terrorist attack * * * is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA," which is confined to "manageable inquiries." *Id.* at 38a-39a. The agency further concluded that, in light of the available evidence, "attempts to evaluate that risk even in qualitative terms are likely to be meaningless and consequently of no use in the agency's decisionmaking." *Id.* at 39a. The court of appeals erred in dismissing those determinations, which reflect the agency's expertise and its careful assessment of the relevant issues. Nonetheless, the express reasoning of the decision below is not directly inconsistent with the decisions of the Second and Eighth Circuits on the question presented here.

cuit's rejection of a "mere foreseeability" standard when it comes to potential criminal conduct is difficult to square with the Ninth Circuit's decision in this case, the cases do not directly conflict because the D.C. Circuit relied on the lack of any "environmental" impact and on the plaintiffs' failure to raise the issue before the agency in a timely manner, and the factual setting of that case (liquor bottles) is obviously not analogous to the facts at issue here. *Id.* at 1091, 1093.

d. The Ninth Circuit's decision has the potential to be highly disruptive for NRC (and perhaps other federal agencies), but the extent of any disruption will depend on how the decision is interpreted by the Ninth Circuit.

i. The question whether NEPA requires an analysis of the potential impacts of terrorist attacks at nuclear facilities has been raised in several licensing proceedings currently pending before NRC.[4] Over the next two years, NRC expects to receive 30 or more license applications for new nuclear power reactors, the first such applications in decades.

An effective licensing process is crucial to bringing new nuclear power capacity on-line at a time when the

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[4] See *System Energy Res., Inc. (Early Site Permit for Grand Gulf EPS Site)*, CLI-06-28, No. 52-0009-ESP (Nov. 9, 2006); *AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station)*, CLI-06-24, No. 50-0219-LR (Sept. 6, 2006), slip op. 2; *Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant)*, 63 N.R.C. 727, 734 n.31 (2006); *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, LBP-06-23, No. 50-293-LR (Oct. 16, 2006), slip op. 32-33; *Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station)*, LBP-06-20, No. 50-271-LR (Sept. 22, 2006), slip op. 17-30; *Pa'ina Hawaii, LLC*, 63 N.R.C. 99, 113-114 (2006). This issue is also among the identified issues in a case pending in the District of Columbia Circuit. *Ohngo Devia Gaudedeh* v. *NRC*, Nos. 05-1419, 05-1420 & 06-1087.

Nation's demand for "clean" energy sources is reaching new heights. In part for that reason, the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, established new programs and financial incentives to encourage the construction of new nuclear power reactors and to protect against unnecessary licensing delays. See *Statement on Signing the Energy Policy Act of 2005*, 41 Weekly Comp. Pres. Doc. 1267 (Aug. 8, 2005). As a former NRC Commissioner, now a Wall Street financier, recently told a Senate Committee, new investment in nuclear power depends on predictability:

> [I]nvestors will need confidence that a new nuclear plant can be built on a predictable schedule and for a predictable cost, that the cost will be competitive with that of other available base load generating alternatives such as coal, and that they will be protected against the risk of licensing and litigation delays at least until the new NRC licensing process has demonstrated a track record of successful performance.

Implementation of the Provisions of the Energy Policy Act of 2005: Hearings Before the Senate Comm. on Energy and Natural Res., 109th Cong., 2d Sess. 67 (2006) (statement of James E. Asselstine) (*Senate Hearings*).

The government shares that concern. To avoid the delays and inefficiencies that plagued nuclear licensing in the 1970s and 1980s, NRC has enacted comprehensive licensing and hearing reforms. Several NRC initiatives faced vigorous opposition but were upheld after judicial review. See, *e.g.*, *Citizens Awareness Network, Inc.* v. *United States*, 391 F.3d 338 (1st Cir. 2004); *Nuclear Info. Res. Serv.* v. *NRC*, 969 F.2d 1169 (D.C. Cir. 1991) (en banc). As a result, NRC now has in place a "licens-

ing and oversight regulatory framework that is effective, predictable, and continues to meet the changing demands of the country." *Senate Hearings* 59 (statement of Chairman Nils J. Diaz). That framework could be jeopardized as to projects in the Ninth Circuit, however, by the new and unpredictable NEPA-terrorism inquiry required by the Ninth Circuit.

The issue could also be relevant to other federal agencies. The Ninth Circuit recently relied on its decision in this case to invalidate a NEPA analysis conducted by the Department of Energy concerning a proposed biological weapons research laboratory. *Tri-Valley Cares* v. *Department of Energy*, No. 04-17232, 2006 WL 2971651 (Oct. 16, 2006). In that case, as in this one, the court of appeals remanded for the agency "to consider whether the threat of terrorist activity necessitates the preparation of an Environmental Impact Statement." *Id.* at *2.

ii. At this juncture, it is unclear how substantial a burden the court of appeals' decision will impose on NRC or other agencies. The court emphasized its view that NRC had decided the issue "categorically" and "as a matter of law," Pet. App. 18a, 21a, and stated that its decision "should not be construed as constraining the NRC's consideration of the merits on remand," because "[t]here remain open to the agency a wide variety of actions it may take," *id.* at 30a, 31a.

Accordingly, the Ninth Circuit's decision does not necessarily foreclose agencies from determining as a factual matter, on either a facility-specific or across-the-board basis, that the risk of terrorism is too speculative to warrant NEPA analysis. Indeed, Ninth Circuit precedent generally allows agencies to determine that a particular impact is too unlikely to require NEPA re-

view. See, *e.g.*, *Ground Zero Ctr.*, 383 F.3d at 1090-1091; *No GWEN Alliance of Lane County, Inc.* v. *Aldridge*, 855 F.2d 1380, 1385-1386 (1988). The panel in this case did not purport to overrule or limit those decisions.

Nor does the court of appeals' decision necessarily foreclose agencies from analyzing the consequences of terrorist attacks by reference to other, previously evaluated impacts. In *Limerick Ecology Action, Inc.* v. *NRC*, 869 F.2d 719 (1989), the Third Circuit upheld NRC's decision not to analyze the potential impacts of sabotage on a facility where the agency had concluded that such an analysis would add little to its existing analysis of the potential impacts of severe accidents, such as fires and earthquakes. *Id.* at 741-742. The Ninth Circuit may permit agencies to follow a similar approach by determining that a terrorist attack could reasonably be assumed to cause impacts similar to those caused by other events, such as natural disasters, that the agency would evaluate under NEPA in any event. Thus, the court of appeals' decision will not *necessarily* require significant additional analysis in most or all cases. That said, however, the Ninth Circuit may construe its decision differently and require burdensome and counter-productive analyses that would delay important projects for years, risk the disclosure of sensitive security information, and divert the agencies' resources from productive pursuits.

e. The federal respondents decided not to file a petition for a writ of certiorari in this case because the Ninth Circuit's decision does not squarely conflict with decisions of other courts of appeals, and because it is not yet clear how burdensome the decision will be. Nonetheless, the federal respondents remain firmly of the view that the decision is incorrect, and that the Ninth Circuit erred in failing to apply the "reasonably close

causal relationship" test required by decisions of this Court. Accordingly, if the Court grants the petition, the federal respondents will support the position of petitioner.

2. Petitioner also challenges (Pet. 18-24) the court of appeals' holding that risks must be analyzed even if they are not quantifiable. Pet. App. 24a. That issue does not independently warrant this Court's review.

Petitioner relies (Pet. 19-20) on a CEQ regulation addressing the evaluation of "reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement" in circumstances where "there is incomplete or unavailable information." 40 C.F.R. 1502.22. In such circumstances, the agency must include in the EIS a "statement that such information is incomplete or unavailable," a description of the relevance of the information, some limited discussion based on any available information, and the agency's evaluation based on generally accepted methods. 40 C.F.R. 1502.22(b)(1)-(4). The regulation provides that, "[f]or the purposes of this section, 'reasonably foreseeable' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason." 40 C.F.R. 1502.22(b).

As petitioner acknowledges (Pet. 20 n.7), that regulation is inapplicable here because it applies only to an EIS, not an EA, and the agency prepared only an EA here. The regulation expressly refers to "an environmental impact statement," and provides that its definition of "reasonably foreseeable" applies only "for purposes of this section," namely Section 1502.22, which

addresses the preparation of an EIS, not an EA. See 40 C.F.R. 1502.22.

Moreover, the Ninth Circuit's holding that risks need not be quantifiable to be analyzed under NEPA, Pet. App. 24a-25a, is not necessarily contrary to Section 1502.22. That regulation contemplates that an EIS will include some limited discussion of some low-probability risks notwithstanding the absence of complete information.

While petitioner asserts that the Ninth Circuit's holding conflicts with *Limerick*, the current version of Section 1502.22 did not apply in *Limerick*, see 869 F.2d at 743 n.29, because the NEPA process at issue there commenced in the early 1980s, see *id.* at 728, well before the current version of Section 1502.22 became effective in 1986, see 40 C.F.R. 1502.22(c). Moreover, while the Third Circuit held that NRC did not violate NEPA when it declined to consider the threat of sabotage, the court of appeals tied its conclusion to the record in that case. See *Limerick*, 869 F.2d at 743-744. Here, in contrast, the Ninth Circuit concluded (albeit incorrectly) that "the agency fails to show adequately that the risk of a terrorist attack is unquantifiable." Pet. App. 25a.

To be sure, the question presented, like the Commission's decision, is not limited to the issue of quantifiability, but also asks whether the risk can be meaningfully analyzed. See Pet. (i), 19-21; Pet. App. 39a ("[A]ttempts to evaluate th[e] risk even in qualitative terms are likely to be meaningless and consequently of no use in the agency's decisionmaking."). On the latter issue, however, petitioner does not even allege the existence of a circuit split. The question whether a particular risk can be meaningfully analyzed is relatively narrow and factbound, especially compared to the first question pre-

sented. The impracticality of meaningfully assessing a remote and improbable risk is relevant, however, to the rule-of-reason analysis required by *Public Citizen* and *Metropolitan Edison*. See pp. 8-9 & n.2, *supra*.[5]

CONCLUSION

The decision of the court of appeals is incorrect, and the United States would participate in support of petitioner if certiorari were granted, but the petition for a writ of certiorari does not clearly satisfy the Court's criteria for plenary review, and accordingly the petition should be denied.

Respectfully submitted.

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[5] The Ninth Circuit erred in imposing the burden on NRC to show that the risk could not be quantified or meaningfully analyzed. See *Limerick*, 869 F.2d at 743-744 (imposing the burden on the party challenging the agency's NEPA analysis). Standing alone, however, that burden-shifting issue would not warrant this Court's review.

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No. 06-466

In the Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner

v.

SAN LUIS OBISPO MOTHERS FOR PEACE, *et al.*,

Respondents

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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INTRODUCTION

This is one of those rare cases in which a lower court, as the Government puts (at 6, 11), has simply "refused" to follow binding precedent of this Court—in this case the "proximate causation" standard mandated by *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766 (1983), and *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004). Indeed, although respondent Mothers for Peace ("MFP") repeatedly characterizes the panel's decision as having "applied" or "followed" these decisions, the panel itself never bothered to *cite Public Citizen*, which, as the Government points out (at 11), rendered untenable the panel's attempt to distinguish *Metropolitan Edison*. As we show in Section I, such a blatant refusal to follow controlling precedents is sufficient to warrant plenary review or summary reversal, without more.

Here, however, there is much more. As the Government points out (at 14), "the Ninth Circuit's decision has the potential to be highly disruptive for NRC ... and perhaps other federal agencies." As we show in Section II, and as explained in briefs by the Nuclear Energy Institute (NEI) and the United States Chamber of Commerce (Chamber), the panel's decision creates, not only risks to national security, but enormous uncertainty in the nuclear power industry and other capital-intensive businesses that must make large investments in facilities subject to NEPA review. That uncertainty and risk of "disruption" will deter the multi-billion-dollar investments necessary to meet, among other needs, the Nation's ever-growing energy requirements. None of the respondents disputes this. And, as we show in Section III, this problem is compounded by the very real and serious circuit conflicts created by the panel's decision.

I. The Ninth Circuit's Refusal To Follow Controlling Precedent Warrants Review Or Summary Reversal.

1. The Government correctly notes (at 11) that the

panel's decision "conflicts with this Court's decisions in *Metropolitan Edison* and *Public Citizen* because it refuses to apply the 'reasonably close causal relationship' standard mandated by those decisions." Indeed, the panel squarely held that "*Metropolitan Edison* and its proximate cause analogy are *inapplicable* here." Pet. App. 20a (emphasis added). This express holding—which mirrors MFP's own argument to the Ninth Circuit (see, *e.g.*, Reply Br. at 5-11)—refutes MFP's contention that the decision below merely "appli[ed] basic principles of proximate causation" established in *Metropolitan Edison* and *Public Citizen*. Opp. at 1; *accord id.* at 9.

The panel's statement in the next paragraph (Pet. App. 20a) likewise refutes MFP's attempt to treat the Ninth Circuit's "remote and highly speculative" standard as merely one variant of the *Metropolitan Edison* standard. Opp. at 8. There the panel stated that, rather than the proximate cause standard of *Metropolitan Edison*, "[t]he appropriate analysis is *instead* that developed by this court in *No Gwen Alliance* v. *Aldridge*, 855 F.2d 1380 (9th Cir. 1988)." Pet. App. 20a (emphasis added). As explained in the petition (at 13-18), this standard is much broader than the proximate cause standard. Under the *No Gwen* standard, a risk must automatically be included in an agency's NEPA analysis, not just when it could be considered the proximate result of the agency's action, but whenever the risk is anything more than "remote and highly speculative." See Pet. 13-14.

2. The panel's rejection of this Court's precedents provides sufficient and compelling grounds for plenary review or summary reversal. According to this Court's rules, one basis for review is that the lower court "has decided an important question of federal law in a way that conflicts with relevant decisions of this Court." S.Ct. R. 10. Accordingly, this Court has often granted plenary review or summary reversal when a lower court has expressly declined to follow a controlling legal standard articulated in this Court's deci-

sions.[1] The Court has also granted relief when the lower court has simply ignored a controlling precedent.[2]

Here the Court faces the unusual situation in which the Ninth Circuit did *both* of these things. As the Government notes (at 6, 11), the panel expressly "refused" to follow *Metropolitan Edison's* proximate cause standard. And, as noted, the panel failed even to acknowledge *Public Citizen*, which, as the petition explained (at 11-14) and the Government notes (at 11) made clear that the *Metropolitan Edison* standard applies to all NEPA reviews, not just to the narrow subset identified in the decision below.[3] The combination of these factors makes this case a particularly compelling candidate for plenary review or summary reversal.

Accordingly, in light of the many examples in which the Court has granted review simply to enforce its precedents, and in light of the Government's acknowledgment (at 6) that the decision below "refuses to apply" the standard "man-

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[1] See, e.g., *Arkansas* v. *Sullivan*, 532 U.S. 769, 771 (2001) (reversing state supreme court decision that was "flatly contrary to this Court's controlling precedent"); *Lambert* v. *Wickland*, 520 U.S. 292, 293 (1997) (per curiam) (reversing Ninth Circuit decision that was "in direct conflict with our precedents")

[2] See, e.g., *Good News Club* v. *Milford Central School Dist.*, 533 U.S. 98, 109 n.3 (2001) (noting "incredible" failure by Court of Appeals to cite a controlling precedent); *Newsweek Inc.* v. *Florida Dep't of Revenue*, 522 U.S. 442, 443 (1998) (reversing decision that "failed to consider" a controlling Supreme Court case); *Flippo* v. *West Virginia*, 528 U.S. 11, 14 (1999) (per curiam) (reversing where lower court made no attempt to distinguish controlling Supreme Court precedent); *United States* v. *Hasting*, 461 U.S. 499, 505 (1983) (reversing Ninth Circuit decision that "ignore[d"] analysis under applicable Supreme Court precedent).

[3] Although *Public Citizen* was decided after briefing was complete, that decision was brought to the Ninth Circuit's attention through a letter under FRAP 28(j) from the NRC dated July 19, 2004, and was discussed at oral argument.

dated by" this Court's decisions, the Government's conclusion that this case "does not clearly satisfy this Court's criteria for plenary review" (*id.* at 20) is incorrect. And in all events, the Government does not dispute the propriety of summary reversal. Cf. Pet. 30.

II. Action By This Court Is Urgently Needed To Avoid The Uncertainty And Increased Costs That The Decision Creates For Nuclear Power Companies And Other Businesses Seeking Or Deciding Whether To Build Expensive Facilities Subject To NEPA Review.

None of the respondents, moreover, disputes that the Ninth Circuit's decision presents "important federal issues" within the meaning of Rule 10, or that the decision will have an immediate, substantial and adverse effect on the nuclear power industry and other businesses contemplating construction of facilities subject to NEPA review. The Government reinforces this point when it notes (at 14) that the "Ninth Circuit's decision has the potential to be highly disruptive for NRC (and perhaps other federal agencies)."

1. It is precisely this potential that creates debilitating uncertainty for PG&E[4] and others who seek to build the next generation of nuclear power plants and other facilities necessary to meet the Nation's energy needs. As the Government notes (at 15), "new investment in nuclear power depends on predictability." Yet, by calling into doubt the continued vitality of *Metropolitan Edison*'s "proximate cause" standard, the Ninth Circuit's decision destroys the very predictability on which that investment depends. Potential

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[4] To continue serving its electricity customers, PG&E must meet its obligations under the Nuclear Waste Policy Act to provide additional spent fuel storage at Diablo Canyon. Although, as noted by MFP (at 16, n.9), *construction* of the facility is not stayed by the Ninth Circuit decision, the NRC has not ruled out a stay in *operation*. Investing in and planning for nuclear plant operations is a complex process—one that abhors such uncertainty.

investors must now face the prospect of lengthy delays in nuclear licensing proceedings, marked by the kinds of "disruptions" (Govt. Br. 14) now sanctioned by the Ninth Circuit's decision.

As a matter of policy, the uncertainty created by the Ninth Circuit's decision runs counter to the Energy Policy Act of 2005, which, as the Government points out (at 15) established new programs and incentives to encourage construction of new nuclear plants and eliminate licensing delays. The Government correctly fears that this framework "could be jeopardized by the new and unpredictable NEPA-terrorism inquiry required by the Ninth Circuit." *Id.* at 16.

The NEI's analysis (at 16-20) makes clear that this uncertainty *will* in fact jeopardize the achievement of the Act's goals. As the NEI points out (at 16-18), the Ninth Circuit's decision has already been invoked in several NRC licensing matters on both existing and future nuclear facilities. This is a major problem because the NRC's exhaustive public hearing process magnifies any delays caused by improper regulatory requirements and creates the potential for endless litigation and large, unpredictable expenses. This prospect, in turn, creates enormous uncertainty for an industry that must finance and build the facilities that are critical to reducing our Nation's reliance on fossil fuel energy and imported oil. As NEI observes (at 19-20), the nuclear power industry is at a critical juncture in evaluating and developing new facilities. And the uncertainty created by the Ninth Circuit is *certain* to discourage "new investment in nuclear power." Govt. Br. 15.

While MFP blithely suggests (at 2) that concerns about the impacts of the decision are "premature," private entities contemplating enormous capital investments cannot afford a "wait and see" approach. Significant regulatory uncertainty is intolerable to investors in nuclear energy and other major infrastructure projects. That uncertainty can only be resolved by prompt reversal of the Ninth Circuit's decision.

2. The Ninth Circuit's decision will also have an enormous, immediate impact on other industries. As the Chamber explains (at 8-10), NEPA has often been used to delay and deter projects disliked by various interest groups in a wide range of industries, and the Ninth Circuit's decision exacerbates this problem.

Specifically, extending NEPA into the realms of terrorism threat assessment and security creates a blueprint for further litigation and delay for every business seeking to build a facility subject to NEPA review. Indeed, as NEI notes (at 17), the Ninth Circuit's decision has already been applied to delay operation of a biological research facility at Lawrence Livermore Laboratories (see *Tri-Valley Cares* v. *Department of Energy*, No. 04-17232, 2006 WL 2971651 (9th Cir. Oct. 16, 2006)). Many other delays are sure to follows.

Because of the uncertainties and potential expense the decision below creates, that decision can only deter development of, and investment in, major projects in every industry that builds facilities subject to NEPA review. Action by this Court is urgently needed to redress that uncertainty.[5]

3. Respondents also do not seriously dispute the national security risks created by the Ninth Circuit's requirement that agencies give additional attention under NEPA to speculative terrorist threats. While those concerns can be mitigated to some extent by such things as security clearances, closed hearings and protective orders, such reviews

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[5] This disruption is particularly problematic given that the area within the Ninth Circuit accounts for more than 20 percent of the Nation's GNP. See United States Dep't of Commerce, Bureau of Economic Analysis, *Gross Domestic Product By State*, available at http:// www.bea.gov/regional/asp.htm (visited on December 21, 2006). The Ninth Circuit's decision also creates uncertainty in every region where the courts have not already addressed the applicability of this Court's proximate cause standard to environmental risks allegedly created by terrorism or other illegal acts.

will necessarily expand access to sensitive information and create opportunities for security breaches. Here again, as a matter of policy, it makes no sense to wait for the Ninth Circuit itself to fix the problem, or to await an *additional* circuit conflict beyond those described in the petition.

III. The Need For Reversal Is Heightened By The Circuit Conflicts Created By The Ninth Circuit's Decision.

In that regard, respondents also fail to undermine our demonstration that the decision below conflicts sharply with decisions of at least three federal courts of appeals.

1. As explained in the petition (at 14-18), the Ninth Circuit's decision on causation conflicts with decisions of the D.C. and Second Circuits and is in substantial tension with a decision of the Eighth Circuit. MFP argues, first, that each of the conflicting cases is "distinct from *Mothers for Peace* with respect to its circumstances, and thus in no case does the holding apply to the circumstances of *Mothers for Peace* or conflict with the Ninth Circuit's ruling." MFP Opp. at 9; see Govt Br. 13-14. But this argument is little more than a truism: *all* cases by definition present "distinct circumstances." The question is whether the holdings are sufficiently different to threaten the coherence and consistency of federal law, and as such warrant resolution by this Court. As demonstrated in the petition (at 15-18), the Ninth Circuit's holding is sufficiently different from the holdings of the D.C. and Second Circuits that the Ninth Circuit, applying to the facts of *this* case the analysis employed by the other Circuits, could not honestly reach the decision reached below. No respondent contests this dispositive conclusion.

Moreover, their attempts to distinguish the conflicting decisions are wholly unconvincing. With respect to the D.C. Circuit's decision in *Glass Packaging Institute* v. *Regan*, 737 F.2d 1083 (D.C. Cir. 1984), for example, MFP argues (at 10) that the case "involved circumstances in which the alleged impact (the possibility that drinkers might be poisoned) was

not causally related to any physical effect in the environment," and that in this case, by contrast, MFP "is concerned about the potentially grave physical environmental impacts that would flow directly from the operation of the Diablo Canyon spent fuel storage facility if the spent fuel storage containers were breached in a terrorist attack." *Accord* Govt. Br. 14. But the chains of causation hypothesized in *Glass Packaging* and this case are exactly the same: a federal agency approves an activity; a third party maliciously intervenes and sabotages the activity; and harm in the human environment results.

Any difference in the nature of the intervening cause—deliberate poisoning in *Glass Packaging*, terrorist sabotage in this case—cannot justify the different results reached by the two Circuits on the core legal question: whether the possibility of a malicious intervening act is sufficient to require environmental assessment under NEPA. The D.C. Circuit held it was not under *Metropolitan Edison*. The Ninth Circuit held that *Metropolitan Edison* "does not apply," and therefore, that the possibility of such an act *was* sufficient to require its inclusion in the agency's NEPA analysis. The conflict in analysis and holding could hardly be more sharp.[6]

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[6] MFP also attempts to distinguish *Glass Packaging* on the ground that the agency there "had evaluated the risk of tampering . . . and found it to be insignificant," whereas here "the NRC has acknowledged the risks of terrorist attacks on licensed nuclear facilities." Opp. at 10. But while the NRC has "acknowledged" the *general* risk terrorist attacks, it has also concluded as a matter of agency expertise that the specific risk MFP raised for review—a terrorist *air* attack on a *particular* storage facility—is "minuscule." See Private Fuel Storage L.L.C., CLI-02-25, 56 NRC 340, 351 (2002). And even if the NRC were to concede that the risk of an air attack on the Diablo Canyon facility is "foreseeable"—and it has not—in *Glass Packaging* the D.C. Circuit squarely rejected the notion that "mere foreseeability" can "trigger a duty to consider an alleged environmental effect." *Glass Packaging*, 737 F.2d at 1091.

Efforts to distinguish *City of New York* v. *Dep't of Transportation*, 715 F.2d 732 (2d Cir. 1983), and *Mid States Coalition for Progress* v. *Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003), are similarly ill-founded. Contrary to MFP (at 11, 12), both decisions addressed the issue of causation. A determination that "the risks of sabotage [are] too far afield" (*City of New York*) or insufficiently specific (*Mid States Coalition*) to warrant consideration of their environmental impacts is necessarily a determination about the causal relationship among the federal action, the risk of terrorism, and the claimed environmental effect. Those decisions cannot be reconciled with *Mothers for Peace* on this basis.[7]

The Government effectively concedes the existence of a circuit conflict on the first issue presented, referring repeatedly to "tension in the case law" and the difficulty of "squar[ing]" the Ninth Circuit's decision with those of the D.C., Second, and Eighth Circuits. See Gov't Brief at 14, 15 n.3, 16. While the Government maintains (at 6, 12, 17) that "there is not a *square* circuit split" on the first question presented, we respectfully suggest that the Government has taken an unduly narrow view of the kind of "conflict" that warrants this Court's review. The point of resolving conflicts is to ensure that similar cases are adjudicated in similar ways from circuit to circuit. Where, as here, different circuits, addressing different factual scenarios, have employed

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[7] Nor can the decisions be reconciled on the basis that they relied on particularized "fact-based conclusions" about the risk of terrorism. Compare Opp. at 11, 12; Gov't Brief at 14-15. As noted, both *City of New York* and *Mid States Coalition* applied a proximate causation standard to *reject* the need for further NEPA review, whereas the Ninth Circuit applied a *stricter* legal standard to *require* such review. Moreover, as the Government notes (at 13 n.3), "NRC specifically assessed the risks of a terrorist attack, and concluded that 'the possibility of a terrorist attack . . . is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.'"

materially different *legal standards, i.e.*, standards that can reasonably be expected to produce different outcomes in similar cases, that conflict requires resolution. Again, no respondent disputes that the Ninth Circuit's causation standard would likely lead to different results than the standard employed by the D.C., Second and Eighth Circuits.[8]

2. Although the Government does not dispute the existence of a conflict on the second question presented, MFP attempts to reconcile the decision below with *Limerick Ecology Action, Inc.* v. *U.S. Nuclear Regulatory Commission*, 869 F.2d 719 (3rd Cir. 1989), through a misleading account of the Third Circuit's decision there. Yes, that court did "not hold that the mere *assertion* of unquantifiability immunizes the NRC from consideration of the issue under NEPA." But it also held that where the NRC has "claim[ed] that it cannot meaningfully consider the issue," the challenging party bears the 'burden to rebut the NRC's claim." *Id.* at 744 n.31. In this case, as in *Limerick*, the challenging party – MFP – has "proposed no meaningful method by which the NRC could either assess or predict sabotage risks." *Id.* at 743. Thus, as the Government puts it (at 20 n.5), relying upon *Limerick*, "[t]he Ninth Circuit erred in imposing the burden on NRC to show that the risk could not be quantified or meaningfully analyzed." That error also puts the Ninth Circuit's decision squarely in conflict with *Limerick*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] Although the conflicts here are clear, the leading treatise on Court practice states, "a clear, square, or irreconcilable conflict among courts of appeals" is not necessary to warrant review. Robert L. Stern et al, *Supreme Court Practice* at 232 (8th ed. 2002). This is illustrated by numerous decisions in which the Court has granted certiorari because a decision was merely "in tension with" decisions in other circuits. *E.g.*, *Sutton* v. *United Airlines*, 527 U.S. 471 (1999); *Darby* v. *Cisneros*, 509 U.S. 137, 143 n.8 (1993).

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No. 06-466

IN THE

Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY

Petitioner,

v.

SAN LUIS OBISPO MOTHERS FOR PEACE, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act ("NEPA") requires a federal agency to consider, as part of its NEPA review of an agency action, the environmental impact of potential sabotage whenever the possibility of sabotage is anything more than "remote and highly speculative," regardless of whether the agency action lacks a close, "proximate-cause" relationship to the potential sabotage and its impacts.

2. Whether an agency is required to consider the risk of sabotage in its NEPA review even if the agency reasonably concludes that the risk is not sufficiently quantifiable to be meaningful or to assist agency decision making under NEPA.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing a membership of nearly three million businesses and organizations of every size, in every industry sector and geographical region of the country.[1] A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus* briefs in numerous cases addressing issues of vital concern to the Nation's business community.

The National Environmental Policy Act of 1969 ("NEPA") requires assessment of the potential environmental impacts of every major federal agency action, including numerous licensing proceedings and regulatory actions. Representing a business community which controls 85% of the nation's critical infrastructure, the Chamber has a substantial interest in ensuring that NEPA's scope is not erroneously extended to require agency analysis of the possible effects of terrorist attacks, which could not reasonably be attributed to the agency decisions that NEPA is designed to inform.

If the decision below were left undisturbed, members of the Chamber would confront NEPA-related red-tape and endless litigation as they sought federal approval for, *inter alia*, construction projects, subway systems, airports, waste treatment facilities, oil refineries and chemical plants—all of which could be subject to terrorist attacks. These projects are

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[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the clerk.

vitally important to our economy and to the stability of our national infrastructure.

STATEMENT

Upon receipt of Petitioner Pacific Gas & Electric Company's ("PG&E") application for a license to store spent nuclear fuel in an independent spent fuel storage installation ("ISFSI"), the Nuclear Regulatory Commission ("NRC") published a notice of opportunity for hearing on the application. 67 Fed. Reg. 19,600 (Apr. 22, 2002). In petitioning to intervene, Respondent San Luis Obispo Mothers for Peace and its coalition (collectively "SLOMFP") requested that the Commission address the environmental consequences of a terrorist attack on the planned storage facility. Pet. App. 69a.

On initial review, the Atomic Safety and Licensing Board ("Board") concluded that SLOMFP's requests represented improper challenges to the NRC's security regulations. Accepting the referral from the Board, the NRC applied an intervening precedent, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-05, 56 N.R.C. 340, 348-350 (2002), to the instant case. Pet. App. 42a. In *Private Fuel Storage*, the NRC declined to interpret NEPA to require consideration of a possible terrorist attack, for four reasons:

- "The causal relationship between approving the PFS facility and a third party deliberately flying a plane into it is too attenuated to require a NEPA review, particularly where the terrorist threat is entirely independent of the facility." Pet. App. 55a.

- "The horrors of September 11 notwithstanding, it remains true that the likelihood of a terrorist attack being directed at a particular nuclear facility is not quantifiable." *Id.*

- "NEPA does not call for a 'worst-case' inquiry[.]" Pet. App. 58a.
- "The public aspect of NEPA processes conflicts with the need to protect certain sensitive information." Pet. App. 62a.

Rejecting the NRC's reliance on these sensible considerations, Pet. App. 30a, the Ninth Circuit concluded that NEPA required the NRC to assess the potential environmental effects of a terrorist attack on the proposed ISFSI. Relying principally on NRC's own ongoing security review of its regulations and programs, the court concluded that the threat was not "remote and highly speculative for NEPA purposes," Pet. App. 23a [internal quotation marks omitted], and that "the NRC ha[d] not established that the risk of a terrorist attack [was] unquantifiable." Pet App. 26a. With respect to limitations on public participation necessitated by information-security requirements, the court found "no support for the use of security concerns as an excuse from NEPA's requirements." Pet App. 29a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has imposed substantial and unnecessary costs on American business and undermined the ongoing collaborative effort between the federal government and the business community to safeguard critical infrastructure. The Ninth Circuit misread NEPA's laudatory objective of ensuring that agencies consider impacts on the environment to incorporate threat assessments of attacks on nuclear facilities. That decision introduces significant redtape and the prospect of endless litigation to a security process which demands flexibility and alacrity. Other Circuits have opted for a more modest approach which recognizes that NEPA does not require agencies to address the consequences of random, criminal behavior by independent actors. Immediate review is warranted to resolve this split in the courts below.

ARGUMENT

I. THIS COURT'S REVIEW IS WARRANTED TO ENSURE THAT NEPA REVIEW REMAINS FOCUSED ON ITS IMPORTANT PURPOSE OF CONFIRMING THAT AGENCIES CONSIDER THE ENVIRONMENTAL EFFECTS OF THEIR DECISIONS AND IS NOT MISUSED TO DELAY OR DERAIL IMPORTANT PROJECTS

There is no question that NEPA serves important purposes by requiring federal agencies to take a hard look at likely environmental effects when deciding whether or how to take particular actions. Every statute, however, has limitations as well as purposes, and both must be observed in order to implement Congress's design. See *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam). Here, the Ninth Circuit has pushed NEPA well beyond proper limits, in a ruling that invites just the sort of procedural abuse that has unfortunately come to characterize much NEPA litigation.

A. As a Regulatory Accountability Statute, NEPA Ensures that Agencies Consider the Environmental Impacts of Their Actions

NEPA operates by "inject[ing] environmental considerations into [a] federal agency's decisionmaking process." *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 143 (1981); see *Robertson v. Methow Valley Citizens Council*, 490 U.S. 343, 349 (1989). In that respect it has been a model for other regulatory accountability statutes. See Serge Taylor, Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform 295 (1984) (describing use of impact statements to analyze inflation, regulatory impact, competition, arms control, and effects on small business).

The present Council on Environmental Quality regulations addressing NEPA review were issued in response to an

Executive Order directing the Council to "make the environmental impact statement process more useful to decisionmakers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on *real environmental issues* and alternatives." Exec. Order No. 11991, 3 CFR 123 (1978) (emphasis added). Even with that mandate, the CEQ regulations contemplate an often lengthy process. First, the relevant agency must determine whether there is any Categorical Exclusion that removes the proposed action from the purview of NEPA. 40 C.F.R. § 1508.4. If not, the agency must prepare an environmental assessment ("EA"), which explores whether the proposed action is likely to result in a significant impact on the environment. 40 C.F.R. § 1508.9. If the agency determines that no such impact will occur, it issues a finding of no significant impact ("FONSI"). 40 C.F.R. § 1508.13. Otherwise, it must prepare an environmental impact statement ("EIS"). 40 C.F.R. § 1502. To allow for public participation, the regulations require a draft, a comment period, and a final EIS that addresses comments received. 40 C.F.R. § 1502.9.

By requiring agencies to prepare an environmental assessment or impact statement, the Act serves two central purposes:

> First, '[i]t ensures that the agency, in reaching the decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.' Second, it 'guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.'

Dep't of Transportation v. Public Citizen, 541 U.S. 752, 768 (2004) (quoting *Robertson*, 490 U.S. at 349 (1989)).

However, nothing in the statute (or its legislative history) evidences any congressional intent to require agencies to consider, in making their own decisions, the possible environmental impacts of later criminal actions of third parties. Nor do those materials evince any intention that NEPA review serve as a vehicle for addressing issues of national security or threat assessment.

B. Because NEPA Can Be Misused to Delay or Derail Important Projects, Courts Must Not Expand The Act's Reach Beyond the Scope of Congressional Intent

NEPA's requirements are essentially procedural: An agency must take a "hard look" at potentially significant environmental effects of its proposed actions, but the Act does not purport to control the agency's ultimate choices. See, e.g., *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978). That procedural mandate has served an important role in correcting a situation in which agencies did not take sufficient account of environmental concerns.

Over time, however, both NEPA's procedural requirements and, in particular, litigation challenging the adequacy of an agency's NEPA compliance have also become "notorious for special interest abuse." Frank B. Cross, *The Judiciary and Public Choice*, 50 Hastings L. J. 355, 375 (1999). An expansive judicial view of NEPA's requirements, which first shapes action at the administrative level and then plays out in follow-on litigation, can introduce significant costs and delay in obtaining agency action—costs and delay that are too often the only real ends of those who use NEPA to impose them.

One commentator describes the phenomenon as follows:

> Delay buys time, which opponents can use to build popular and political opposition to the project. New information may develop, partially through the dis-

> closures of the NEPA statement. Inflationary pressures, and other costs, could economically doom the project during the delay. NEPA thereby became an important means to the end: stopping the project.

Denis Binder, *NEPA, NIMBYs and New Technology*, 25 Land and Water Law Review 11, 17 (1990). See also, e.g., James Dao, *Environmental Groups to File Suit over Missile Defense*, N.Y. Times, Aug. 28, 2001, at A10 (reporting plaintiff's statement that "the hope is that [the NEPA-induced] delay will lead to cancellation.... That's what we always hope for in these suits."); Daniel Ackman, *Highway to Nowhere: NEPA, Environmental Review and the Westway Case*, 21 Colum. L.J. & Soc. Probs. 325 (1988). In other words, NEPA can easily become a tool of those interested in scuttling a project for any reason.

In this regard, "[t]he monkey wrencher ... places a high value on NEPA because it affords extraordinary opportunities to throw up procedural roadblocks that may delay or kill projects the monkey wrencher opposes." Bradley C. Karkkainen, *Whither NEPA?* 12 N.Y.U. Envtl. L.J. 333, 339 (2004) (citing Edward Abbey, The Monkey Wrench Gang (1975)). This misuse of NEPA imposes real costs, not only on affected private parties but on the very agency decision-making processes that NEPA was meant to *enhance*. "[W]here appeals are brought against entire programs, or simply to delay decisions, they can cause great time and resource drains on the agency and its decision making[.]" Stark Ackerman, *Observations on the Transformation of the Forest Service: The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making*, 20 Envtl. L. 703, 730 (1990).

None of this is an argument for refusing to enforce NEPA in accordance with its terms. But the reality of NEPA abuse is a powerful reason for this Court to ensure that judicial decisions do not extend NEPA's reach beyond what Congress

could ever have contemplated or intended. That is what the Ninth Circuit has done here.

C. Because Of NEPA's Broad Scope, The Ninth Circuit's Decision Will Likely Impose Serious Risks And Delays On A Wide Variety Of Projects And Industries.

NEPA's broad scope means that the potential impact of the Ninth Circuit's decision extends well beyond the nuclear industry. NEPA applies by its terms to "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4321; 40 C.F.R. § 1500.1(c). "Federal action" has been defined expansively, to include circumstances where an agency acts on its own behalf, or approves a lease of land on which the action will occur, or grants a permit or license that authorizes the action, or uses federal monies to fund the action. See, e.g., *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1088-89 (D.C. Cir. 1973). Thus, the scope of NEPA's application—and therefore the impact of the Ninth Circuit's decision—is very broad: any industry whose construction projects are routinely subject to federal licensing and permitting, or which are federally funded, is within reach of this decision. Here are but a few of countless possible examples:

- Oil, coal, and natural gas companies are affected by NEPA when, for example, their mining and exploration efforts occur on federal land or on federal offshore waters. See, e.g., *Cady v. Morton*, 547 F.2d 786 (9th Cir. 1975) (coal); *Suffolk Cty. Sec. of the Interior*, 562 F.2d 1368 (2d Cir. 1977) (oil and gas).

- Oil and other pipeline projects are brought within NEPA to the extent that they require any federal permits or rights-of-way across federal land. See, e.g., *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir. 1973) (describing the environmental

impact statements filed in connection with the Trans-Alaska Pipeline).

- Natural gas pipeline projects are subject to NEPA review by 15 U.S.C. § 717f(c)(1)(A), which prohibits construction of most pipelines without first obtaining a "certificate of public convenience and necessity" from the Federal Energy Regulatory Commission, and which therefore renders all such construction a "federal action" for NEPA puposes. See, e.g., *Fuel Safe Washington v. Fed. Energy Reg. Comm'n*, 389 F.3d 1313, 1317-18 (10th Cir. 2004).

- Oil, gas, and coal power projects are subject to NEPA when funded in part by federal programs such as (for example) the Clean Coal Power Initiative. See, e.g., *Dep't of Energy, Notice of Intent to Prepare an Environmental Impact Statement for the Colorado Springs Next-Generation CFB Coal Generating Unit, Fountain*, CO, 68 Fed. Reg. 48893 (Aug. 15, 2003).

- Hydroelectric power projects and transmission lines are subject to NEPA by virtue of the licensing requirements of the Federal Power Act, 16 U.S.C. § 791a et seq.

- Construction and infrastructure development companies are subject to the act whenever their projects involve the interstate highway system, including road, bridge, and tunnel projects. See, e.g., *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323 (4th Cir. 1972).

- Real estate developers and builders are affected by the act through their involvement in projects involving HUD or other federal financing, or when they construct federal buildings. See, e.g., *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974).

To be sure, there are some exceptions to the NEPA regime. For example, agency actions pursuant to the Clean Air Act, are by statute deemed not to constitute "major federal actions" for NEPA purposes, 15 U.S.C. § 793(c)(1), although the Environmental Protection Agency maintains a policy of conducting "voluntary" NEPA reviews in some circumstances. See Notice of Policy and Procedures for Voluntary Preparation of Nation Environmental Policy Act (NEPA) Documents, 63 Fed. Reg. 58045 (Oct. 29, 1998).)

Even considering such exceptions, however, the broad scope of federal funding, licensing, and permitting activity brings within the NEPA framework an enormous number of projects and industries that are potentially affected by the Ninth Circuit's decision.

II. THE COURT SHOULD GRANT REVIEW TO MAKE CLEAR THAT CRIMINAL ACTS OF THIRD PARTIES ARE NOT WITHIN THE PURVIEW OF NEPA

NEPA is intended to require agencies to think about the foreseeable environmental consequences of *their* actions. It was never intended to require them to consider the remotely conceivable consequences of possible later actions by criminal third parties—or to turn agency *environmental* assessments into terrorist *threat* assessments or assessments of the nature or adequacy of national security arrangements. This Court should grant review to rein in the Ninth Circuit's departure from the restrained approach to NEPA's scope adopted by this Court and other circuits and to avoid undermining the substantial existing collaboration between the business community and the government that is designed to protect the nation's critical infrastructure through more appropriate means.

A. The Ninth Circuit has Departed from this Court's Holdings that a Proposed Agency Action Must be the Legally Relevant Cause of an Environmental Effect in Order to Require NEPA Review

The CEQ's regulations articulate an important distinction that has been adopted and clarified in this Court's decisions. Those regulations define the "effects" an agency must consider under NEPA as follows:

> 'Effects' include:
>
> (a) Direct effects, which are caused by the action and occur at the same time and place.
>
> (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

40 C.F.R. § 1508.8. Whether an effect is direct or indirect, an agency must address it only if it would be "caused by" the agency's proposed action.

In *Metropolitan Edison Co. v. People Against Nuclear Energy, et al.*, 460 U.S. 766 (1983), and *Public Citizen,* this Court emphasized that this causation test imposes real limits on NEPA's scope. In *Metropolitan Edison*, plaintiffs residing near a nuclear facility contended that NEPA required consideration of their psychological harm caused by their perception of the risk of a nuclear accident. Concerned that recognizing such a claim "might [cause NEPA to] embrace virtually any consequence of a governmental action[,]" 460 U.S. at 772, this Court held:

> Our understanding of the congressional concerns that led to the enactment of NEPA suggests that the terms "environmental effect" and "environmental impact" in § 102 be read to include a requirement of *a reasonably close causal relationship* between a change in the physical environment and the effect at issue. This requirement is like the familiar doctrine of proximate cause from tort law.

460 U.S. at 774 (emphasis added).

Two decades later, the Court returned to the principles of legal causation in *Public Citizen*. In that case, the NEPA process was invoked to require the Department of Transportation to evaluate whether its action to issue licenses for cross-border trucking would lead to increased traffic from Mexican truckers even though the decision to permit such cross-border traffic had been made by the President in a prior executive order enforcing commitments made pursuant to the North American Free Trade Agreement. Reaffirming the approach outlined in *Metropolitan Edison*, this Court indicated that

> courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor *responsible for an effect* and those that do not.

541 U.S. at 767 (emphasis added) (quoting *Metropolitan Edison*, 460 U.S. at 774 n.7). The Court then confirmed that, "where an agency has no ability to prevent a certain effect due to its limited statutory authority[,]" it cannot be "considered a legally relevant 'cause' of the effect." 541 U.S. at 770.

In light of *Metropolitan Edison* and *Public Citizen*, this Court should grant review to correct the Ninth Circuit's erroneous holding that a federal agency's action in licensing a facility, or approving some other public or private project,

would be the "legally relevant cause" of environmental effects resulting from some later terrorist attack on the facility or project.

B. Agencies Should Not be Required to Address the Environmental Effects of the Random Criminal Acts of Third Parties

Requiring an agency to make current decisions as though it would be responsible for such remotely possible effects, moreover, will not further NEPA's purpose of requiring consideration of the reasonably foreseeable environmental effects of *the agency's* actions.

This point was made persuasively in the Nuclear Regulatory Commission's *Private Fuel Storage* decision—the decision whose reasoning was rejected by the Ninth Circuit. There, the NRC explained why it accounted for natural disasters but declined to do so for the hypothetical terrorist attack:

> The Commission evaluates the impacts of accidents precipitated by natural events such as earthquakes, hurricanes, and other severe storms. Unlike acts of terrorism, such events are closely linked to the natural environment of the area within which a facility will be located and are reasonably predictable by examining weather patterns and geological data for that region. We do not know of similar principles that would permit reasonable prediction of an act of terrorism against a particular facility. Terrorism is a global issue, involving stochastic criminal behavior, independent of the planned facility.

Pet. App. 49a-50a n.18.

That reasonable approach is consistent with this Court's decisions. Licensing of a particular nuclear facility will not increase the general incidence of terrorism, which finds its source in ideological struggles far afield from Diablo Canyon. Like the Department of Transportation in *Public Citi-*

zen, which did not have authority to prevent increased border traffic, the NRC does not control, and cannot influence, the terrorism variable. Moreover, addressing terrorist threats, or appropriate countervailing security measures, as part of an agency's NEPA process would require that process to stray well outside the proper bounds of NEPA analysis and into areas covered by other processes, other statutes, or other agencies. That approach, embraced by the Ninth Circuit, distorts NEPA past all recognition. As the D.C. Circuit put it in *Glass Packaging Inst., et al. v. Regan*, it is most unlikely that "Congress fashioned NEPA as an administrative incarnation of the policeman's squad car, roving the streets in search of sporadic criminal activity which may occasionally occur in the aftermath of an agency action, there to arrest the criminal in the name of 'environmental protection.'" 737 F.2d 1083, 1092 (D.C. Cir. 1984)

C. The Ninth Circuit's Departure From the Proper Approach Employed by Other Circuits Will Undermine Cooperative Efforts by Businesses and the Government to Safeguard Critical Infrastructure from Terrorist Attack

The petition demonstrates how the Ninth Circuit's decision in this case conflicts with the decisions of other circuits. Pet. 9-18, 21-24. Those courts have deferred to reasonable agency decisions that give NEPA full effect, but within proper bounds. That more modest approach allows agencies to proceed with a wide range of decisions affecting public or private projects that *could* be subject to terrorist attack, without becoming entangled in administrative consideration of extraneous and speculative questions, and without having those same questions then made the subject of burdensome NEPA litigation. This Court should grant review to address the conflict in the decisions and restore agencies' ability to act without undue delay or expense on projects of all types throughout the Ninth Circuit.

This Court's review is especially important in light of the many cooperative efforts by government and business since September 11, 2001, to minimize the risk of, and potential harm from, further terrorist attacks. See, e.g., George W. Bush, The National Strategy for the Physical Protection of Critical Infrastructures and Key Assets (Feb. 2003) at http://www.whitehouse.gov/pcipb/physical_strategy.pdf; Homeland Security Advisory Council, Report of the Critical Infrastructure Task Force (Jan. 2006) at http://www.dhs.gov/xlibrary/assets/HSAC_CITF_Report_v2.pdf. With private enterprise controlling roughly 85% of the nation's critical infrastructure, see U.S. Government Accountability Office, Critical Infrastructure Protection: Progress Coordinating Government and Private Sector Efforts Varies by Sector Characteristics (Oct. 2006), this cooperation is essential. See Jeffrey E. Garten, *Homeland Security Could Really Shake Up Business*, Business Week, Sept. 2, 2002, at 24 (explaining that current "challenge ... require[s] a level of public-private cooperation not seen for decades"). By improperly introducing additional NEPA-related costs and delay into the process of making agency decisions relating to any activity or project potentially subject to terrorist attack, the Ninth Circuit's decision will interfere with that collaborative effort throughout the court's jurisdiction—and perhaps in other Circuits, where the decision will be cited as new and persuasive authority. As explained above, moreover, that decision will likely affect an enormous number of building and other projects and many different industries.

The Chamber fully supports proper enforcement of NEPA's requirement that federal agencies consider the reasonably foreseeable environmental impacts of *agency* actions. The Ninth Circuit's decision however, strays well beyond the proper bounds of NEPA, requiring consideration of remotely possible effects of later criminal actions by third parties. That requirement will do nothing to advance NEPA's real purposes, but it will add delay, expense, and

litigation to agency decision-making that is critical to effective public-private cooperation not only in the nuclear power field but in many other areas in which the Chamber's members operate. This Court should grant review and reverse.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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No. 06-466

IN THE

Supreme Court of the United States

PACIFIC GAS & ELECTRIC CO.,

Petitioner,

v.

SAN LUIS OBISPO MOTHERS FOR PEACE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NUCLEAR ENERGY INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTEREST OF AMICUS CURIAE

The Nuclear Energy Institute (NEI) represents the commercial nuclear energy industry on regulatory matters.[1] NEI's members include every entity licensed by the Nuclear Regulatory Commission to generate electricity at a commercial nuclear power plant or to store used commercial nuclear fuel in the United States. Members also include nuclear plant designers, major architecture and engineering firms, fuel fabrication facilities, and other organizations and individuals involved in the nuclear energy industry. The Ninth Circuit's decision in this case will affect licensing proceedings for every existing and proposed nuclear power plant and fuel storage facility in the United States. NEI and its

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than NEI, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

members have an interest in ensuring that the National Environmental Policy Act and the Atomic Energy Act are interpreted and implemented together in a correct and sensible manner that protects the public and the environment without pointless delay and expense.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit has held that the National Environmental Policy Act (NEPA) requires the Nuclear Regulatory Commission (NRC) to consider the environmental consequences of potential terrorist sabotage before licensing the construction and operation of an Independent Spent Fuel Storage Installation (ISFSI) at an existing nuclear power plant. That decision departs from the approach taken by this Court and by other courts of appeals in construing the scope of NEPA. It also defies NEPA's "rule of reason" by imposing substantial burdens on the licensing process without improving either the physical security of licensed facilities or the NRC's consideration of reasonably foreseeable environmental impacts of license approval.

The NRC already defines stringent security requirements for nuclear facilities through other statutory and administrative procedures. It enforces those requirements, and thoroughly considers the reasonably foreseeable environmental impacts of licensing decisions, during the process of licensing any nuclear power plant or ISFSI. The Ninth Circuit's decision will add nothing positive to that process. It will, however, add delay and expense, as is clear from developments in other proceedings even in the short time since the court of appeals' decision. This will burden the efforts of the nuclear power industry and the federal government to fill the widening gap between the demand for power and domestic energy resources. Particularly in light of the critical importance of nuclear power to the Nation's long-term energy security, and the large number of license applications now pending or expected to be filed with the NRC in the near future, the Ninth Circuit's decision warrants review and reversal by this Court.

ARGUMENT

I. THIS COURT HAS RECOGNIZED IMPORTANT LIMITS ON THE SCOPE OF NEPA ANALYSIS

As the petition explains (Pet. 9-14), this Court's decisions in *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766 (1983), and *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004), make clear that NEPA should not be construed to force agencies to consider environmental impacts for which they cannot reasonably be held responsible. Nor should NEPA be construed to require agencies to perform analyses that would not, under the circumstances, meaningfully inform agency decisions about whether or how to take a particular action.

In *Metropolitan Edison*, the Court held that NEPA did not require the NRC to consider the "severe psychological distress" that local residents might suffer if a nuclear plant resumed operations, even though relicensing the plant would be a "but-for" cause of any such distress. 460 U.S. at 774. The Court explained that "[t]ime and resources are simply too limited" for Congress to have intended to extend NEPA to cover every conceivable impact of an agency's decision. *Id.* at 776. Instead, the Court recognized that NEPA's underlying policies and Congress's intent limit the Act's scope in a manner it characterized as similar to "the familiar doctrine of proximate cause from tort law." *Id.* at 774 & n.7. Applying that limitation, the Court found the causal relationship between the federal action at issue, an ensuing change in the physical environment, and the feared distress of residents "too attenuated" to make the NRC potentially "responsible for [the feared] effect" in a way that required NEPA analysis. *Id.* The residents' claim "lengthen[ed] the causal chain beyond the reach of NEPA." *Id.* at 775.

In *Public Citizen*, the Court again recognized commonsense limitations on the scope of NEPA. The President announced that he would lift a ban on cross-border operations by Mexican motor carriers, subject to the promulgation of safety regulations by the Federal Motor Carrier Safety Administration (FMCSA). The FMCSA's NEPA assessment

considered the increased emissions and noise that would result directly from the inspection regime to be established by the regulations, but not environmental consequences that might be caused by the increased cross-border traffic itself. The agency reasoned that those consequences resulted from the President's decision to permit the traffic, not from the agency's safety regulations. 541 U.S. at 761.

This Court agreed. Although the regulations were necessary to permit the cross-border traffic, and would inevitably trigger any environmental effects of that traffic, that was "insufficient to make [the FMCSA] responsible for [those] effect[s] under NEPA." 541 U.S. at 767. Moreover, while NEPA aims to ensure that agencies consider information about potential environmental effects before deciding whether and how to take a particular action, and to facilitate public participation in that consideration, those purposes also serve to limit the statute's reach:

> [I]nherent in NEPA and its implementing regulations is a "rule of reason," which ensures that agencies determine whether and to what extent to prepare an [Environmental Impact Statement (EIS)] based on the usefulness of any new potential information to the decisionmaking process. Where the preparation of an EIS would serve "no purpose" in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS.

Id. at 767-768 (citations omitted).

II. Environmental Effects That Might Be Caused By A Terrorist Attack On A Licensed Facility Are Not Attributable To The NRC For NEPA Purposes

Public Citizen and *Metropolitan Edison* recognize that Congress intended NEPA to require federal agencies to consider only those environmental impacts for which their proposed action would be a reasonably proximate cause. In this case, the Ninth Circuit failed to recognize that, as the NRC reasonably concluded, environmental harm that might

be caused by a terrorist attack on a federally-licensed nuclear facility is not the sort of potential environmental effect that could reasonably be viewed as a proximate result of the NRC's licensing decision. *See* Pet. App. 38a-40a (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 N.R.C. 340, 349 (2002)); *see also City of New York* v. *Department of Transp.*, 715 F.2d 732, 750 (2d Cir. 1983) ("With respect to environmental consequences that are only remote possibilities, an agency must be given some latitude to decide what sorts of risks it will assess.").

Unlike the Ninth Circuit in this case, other courts of appeals have read NEPA to ensure that agencies remain focused on reasonably direct environmental impacts of proposed actions. For example, when the Bureau of Alcohol, Tobacco, and Firearms decided to permit the sale of alcohol in plastic bottles, the D.C. Circuit rejected a claim that NEPA required the Bureau to consider the human health effects that might ensue if a malevolent or deranged third party injected poisons through the plastic. *Glass Packaging Inst.* v. *Regan*, 737 F.2d 1083, 1091 (D.C. Cir. 1984). The court reasoned even if an agency action might result in "reasonably foreseeable" criminal acts, that is not sufficient to require the agency to consider the environmental impacts of those acts under NEPA. *Id.* The court explained that stretching NEPA's scope to such extremes would ultimately *interfere with* agencies' ability to consider the potential environmental impacts that are more realistically related to a proposed action. "The policies served by NEPA are too important to be diluted" by over-reading its requirements. *Id.* (citing *Metropolitan Edison*, 460 U.S. at 775-776). Similarly, in *City of New York* v. *Department of Transportation*, the Second Circuit upheld an agency's determination that the risk of sabotage directed against highway transportation of radioactive materials was "too far afield for consideration." 715 F.2d at 750; *see also Limerick Ecology Action* v. *Nuclear Regulatory Comm'n*, 869 F.2d 719, 743 (3d Cir. 1989)

(NRC did not act arbitrarily and capriciously in deciding not to evaluate the risk of sabotage in an EIS).

The Ninth Circuit has departed sharply from this approach by holding that NEPA requires the NRC to consider the possible environmental effects of a terrorist attack in deciding whether to license a nuclear facility. The existence or operation of a facility is no more than a "but-for" cause of any possible attack upon the facility, and thus of the attack's environmental effects. Such "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA," *Public Citizen*, 541 U.S. at 767. The Ninth Circuit erred in failing to recognize that, for NEPA purposes, the "legally relevant cause," *id.* at 769, of the environmental effects of terrorist sabotage at a nuclear facility would be the acts of the terrorists—not the licensing decision made by the NRC. The resulting conflict among the Ninth, Second, and D.C. Circuits in their approach to this issue warrants resolution by this Court.

III. NEPA Review Of The Environmental Impacts Of Possible Terrorist Attacks Would Enhance Neither The NRC's Comprehensive Regulation Of Facility Security Nor Its Consideration Of Environmental Concerns

In addition to misinterpreting the scope of impacts that NEPA requires agencies to consider, the Ninth Circuit's decision also betrays NEPA's "rule of reason." *Public Citizen*, 541 U.S. at 767. As explained below, Congress and the NRC have addressed the need for security at nuclear power facilities through comprehensive statutory and regulatory schemes. The NRC sets security standards based on a careful and sophisticated threat assessment that assumes the existence of a well-equipped terrorist force. *See* Part III.A. It encourages public notice and comment on those standards, *id.*, and has acted to update them since the attacks of September 11, 2001, *see* Part III.B. Finally, rigorous review during the licensing process ensures both that proposed facilities will comply with the applicable security standards and that a thorough evaluation of reasonably foreseeable environmental impacts has been conducted. *See* Part III.C.

Because the NRC's regulations comprehensively address security at nuclear power facilities and already require consideration of the possible environmental impacts of untoward events that could cause releases of nuclear material or radiation, requiring the NRC and licensees to undertake a separate analysis of the environmental consequences of possible terrorist attacks will not improve either security or the NRC's consideration of environmental impacts proximately caused by the licensing decision. Under the "rule of reason," NEPA does not require the NRC to undertake such a pointless analysis. *See* Part III.D.

A. The NRC Administers A Stringent Regulatory Regime Governing The Steps All Licensees Must Take To Secure Plants Or Spent Fuel Facilities

Under the Atomic Energy Act of 1954 (AEA), Pub. L. No. 83-703, 68 Stat. 936 (codified at 42 U.S.C. §§ 2011 *et seq.*), "no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public." 42 U.S.C. § 2133(d). As a result, in its licensing decisions the NRC is required not only to consider public health and safety, but specifically to ensure the physical security of licensed facilities. For example, the Commission is authorized to:

> [E]stablish by rule, regulation or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security[.]

42 U.S.C. § 2201. Other provisions of the Act require the NRC to:

- Establish minimum criteria for the issuance of licenses for the distribution of "special nuclear material," 42 U.S.C. § 2014, such as fuel or spent fuel, depending on the degree of impor-

tance to the common defense and security or to public health and safety.

- Promulgate regulations or issue orders to "prohibit the unauthorized disclosure of safeguards information," including information concerning plans, procedures and equipment to ensure the security of special nuclear materials. *Id.* § 2167.
- Prohibit disclosure of information concerning the location and safeguards of power plant equipment vital to the safety of special nuclear material and byproduct materials. *Id.*

To comply with the AEA's requirements, the NRC has created a sophisticated and continually evolving regulatory framework to ensure the physical security of nuclear facilities. That framework includes, for example, 10 C.F.R. Part 73, entitled "Physical Protection of Plants and Materials," which is exclusively devoted to nuclear security issues, including those at licensed installations such as nuclear power plants and ISFSIs. *See* Final Rule, Requirements for the Physical Protection of Nuclear Power Reactors, 42 Fed. Reg. 10,838 (Feb. 24, 1977).

Part 73 spans 75 pages in the Code of Federal Regulations. It requires licensed operators of power plants, ISFSIs, and other "fixed sites" to establish and maintain a comprehensive physical protection system to protect against sabotage. The NRC's basic approach is to identify the "design basis threat" and then to require such facilities to be protected against that threat. *See* 10 C.F.R. § 73.1. Although Part 73 does not disclose the non-public assumptions underlying the design basis threat, it does explain the threat's general contours. Nuclear facility licensees governed by Part 73 must assume that they will suffer "determined violent external assault, attack by stealth, or deceptive actions" by several persons who are "well-trained (including military training and skills) and dedicated." *Id.* § 73.1(a)(1)(i)(A). They must expect the attackers will have inside assistance from "a knowledgeable individual" who

will provide information, facilitate entry and exit, disable alarms and internal communications, and offer violent support for the attack. *Id.* § 73.1(a)(1)(i)(B). The attackers are assumed to have: "hand-held automatic weapons, equipped with silencers and having effective long range accuracy"; "incapacitating agents and explosives" for use in gaining entry to or sabotaging the plant or for destroying fuel container integrity; and even, in the case of an attack on a power plant, a "four-wheel drive land vehicle bomb." *Id.* §§ 73.1(a)(1)(iii), 73.1(a)(2)(i)(C)-(E).

To defend against such attacks, Part 73 requires a licensee to "establish and maintain an onsite physical protection system and security organization" to ensure that its operations "are not inimical to the common defense and security and do not constitute an unreasonable risk to the public health and safety." *Id.* § 73.55(a).[2] Section 73.55 goes on to specify the nature of that system in meticulous detail, requiring that it include, among other things:

- A guard force comprised of individuals whose fitness, marksmanship abilities, armament and training are the subject of a dedicated 13-page Appendix to the regulation. *Id.* App. B.
- Multiple layers of "physical barriers" that create illuminated "isolation zones" where people can be observed and evaluated in the event of any plant penetration. *Id.* § 73.55(c).

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[2] Section 73.55 applies to nuclear power plants and, with minor exceptions, to ISFSIs operating under the "general license" provisions of 10 C.F.R. § 72.212. *See* 10 C.F.R. § 72.212(b)(5). ISFSIs that operate under a site-specific license, such as the one specifically at issue in this case, must satisfy security requirements specified in 10 C.F.R. § 73.51. *See id.* § 72.182. Section 73.51 similarly requires licensees to "establish and maintain a physical protection system" that will ensure that their activities do not pose an "unreasonable risk to public health and safety," and contains detailed requirements concerning physical barriers, illuminated isolation zones, alarm systems, and guard forces and their qualifications. The Ninth Circuit's decision would apply to all NRC licensing proceedings.

- Bullet-resistant doors, ceilings, floors, and walls in crucial control areas. *Id.*
- Detection systems capable of ferreting out firearms and explosives, supervised by individuals in a bullet-resistant observation post. *Id.* § 73.55(d).

The NRC does more than just specify required security measures. To assess security at nuclear power plants, it conducts "force-on-force" exercises designed to test the effectiveness of those measures.[3] A force-on-force inspection uses both a table-top drill and a realistically simulated commando-style live attack on the licensee's facility to probe for security deficiencies.[4] In the simulation, a mock adversary force attacks the facility, emulating the behavior of a group trying to damage the reactor's core or spent fuel pool and thereby release radiation to the environment. The attacking force uses simulated weapons and explosives to ensure the most rigorous test possible of the licensee's security measures. These performance-based inspections—unique among federal regulatory programs that cover commercial industries—verify that a power plant's physical features (such as fences, walls and other barriers), security devices (such as alarms and detection equipment), and guard forces can protect its facilities, and ensure that the possibility of an attack does not create an unreasonable risk to public health or safety.

As the NRC has concluded, by virtue of these and other security arrangements:

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[3] The information in this paragraph is drawn from the NRC's website: http://www.nrc.gov/what-we-do/safeguards/faq-force-on-force.html, and http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/force-on-force.html.

[4] A table-top drill is a meeting where representatives from relevant facility operations and security divisions explain and test their institutional reactions to threat scenarios proposed by regulatory personnel.

> [N]uclear power plants are among the most hardened and secure industrial facilities in our nation. The many layers of protection offered by robust plant design features, sophisticated surveillance equipment, physical security protective features, professional security forces, access authorization requirements, and NRC regulatory oversight provide an effective deterrence against potential terrorist activities that could target equipment vital to nuclear safety.

Riverkeeper, Inc. v. *Collins*, 359 F.3d 156, 160 (2d Cir. 2004) (quoting *Entergy Nuclear Operations*, Nos. 50-003, 50-247, & 50-286, at 5 (NRC Nov. 18, 2002)).

B. Since September 11, 2001, The NRC And The Nuclear Industry Have Redoubled Their Efforts To Secure Licensed Facilities From Terrorist Attack

Since September 11, 2001, the NRC has thoroughly reviewed its security regulations in concert with officials from the Department of Homeland Security, the Federal Bureau of Investigation, and the Departments of Transportation and Energy. *See Riverkeeper*, 359 F.3d at 160-161, 168-169; *Private Fuel Storage*, 56 N.R.C. at 343-345, 356-357. It has redefined the "design basis threat" used as the basis for security measures and testing at nuclear power plants. *See* p. 8, *supra*; Revised Design Basis Threat Order, 68 Fed. Reg. 24,517 (May 7, 2003). And it has ordered licensees to implement new and more stringent anti-terror measures at their facilities. *See* Order Modifying Licenses, 67 Fed. Reg. 65,150 (Oct. 23, 2002); Order Modifying Licenses, 67 Fed. Reg. 65,152 (Oct. 23, 2002); Interim Compensatory Measures Order, 67 Fed. Reg. 9792 (Mar. 4, 2002); Access Authorization Order, 68 Fed. Reg. 1643 (Jan. 3, 2003); Security Personnel Training and Qualification Requirements Order, 68 Fed. Reg. 24,514 (May 7, 2003). While the specifics of those changes are not all public, the new measures generally include additional physical barriers, patrols, security posts,

and training.[5] In addition, the NRC has established the Office of Nuclear Security and Incident Response to work with law enforcement agencies and the Department of Homeland Security to ensure immediate operational security and develop long-term security policy. *See Riverkeeper*, 359 F.3d. at 344-345.

For their part, NRC licensees have made extraordinary investments to fulfill their own obligations under the AEA to ensure that nuclear facilities are protected against terrorist attack. *See Riverkeeper*, 359 F.3d at 168-169; *Private Fuel Storage*, 56 N.R.C. at 344. Since September 11, NEI's industry members have spent more than $1 billion to implement the NRC's orders and respond to the revised design basis threat. That money has gone to hire and train more security personnel at power plants and fuel storage facilities, and to add security patrols, security posts, and physical and vehicle barriers. *See* 56 N.R.C. at 344. NEI members have added measures to guard adjacent waterways and additional land areas. *See id.* They have evaluated potential facility vulnerabilities, and developed plans for responding to events that could cause damage to their plants. *See* 359 F.3d at 161. And they have improved their coordination with law enforcement and military authorities and imposed additional restrictions on site access. *See* 56 N.R.C. at 344.

C. The NRC's Licensing Procedures Ensure Compliance With Security Regulations And Mandate Consideration Of Reasonably Foreseeable Environmental Impacts

The NRC applies these regulations to licensees through a rigorous licensing process. When an applicant files a request for a facility-specific license from the NRC, the AEA requires the NRC to hold a formal hearing and to afford any

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[5] The NRC recently initiated a rulemaking to incorporate into its regulations the security requirements prescribed previously by individual orders. *See* Power Reactor Security Requirements, 71 Fed. Reg. 62,664 (proposed Oct. 26, 2006).

person "whose interest may be affected by the proceeding," 42 U.S.C. § 2239(a)(1)(A), the right to be heard. The NRC has promulgated procedural regulations, embodied in 10 C.F.R. Part 2, Subpart L, to govern the conduct of such proceedings for major facilities, including nuclear power plants. *See* 10 C.F.R. §§ 2.1200 *et seq.*[6]

Subpart L proceedings are adjudicatory hearings that comply with the procedural requirements of 5 U.S.C. §§ 554-557. *See Citizens Awareness Network, Inc.* v. *Nuclear Regulatory Comm'n*, 59 F.3d 284 (1st Cir. 1995). Accordingly, they allow for even more public participation than notice-and-comment rulemakings. The NRC makes available a public hearing file containing the licensee's application, the NRC's environmental impact reports, and any other NRC report or correspondence relating to the proposed action. 10 C.F.R. § 2.1203. It then holds public hearings on written submissions from interested parties, and may also hold oral hearings in which the parties may submit questions and, where appropriate, request the right to cross-examine witnesses themselves. *Id.* §§ 2.1204, 2.1207. The outcome of a licensing hearing is subject to review by the full Commission, *id.* §§ 2.341, 2.1212, and the Commission's decision is subject to judicial review, *see* 42 U.S.C. § 2239.

The NRC's regulations also require detailed consideration, during licensing proceedings, of the potential environmental impacts of a licensing decision. Any proceeding that requires a hearing under AEA Section 189(a) also includes NEPA review:

> Any party to a proceeding may take a position and offer evidence on the aspects of the proposed action within the scope of NEPA and this subpart in accordance with the provisions of part 2 of this chap-

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[6] Although the licensing proceedings for the ISFSI at issue in this case occurred under the NRC's subpart K "hybrid" hearing procedures, the Ninth Circuit's holding will apply with equal force to more broadly applicable Subpart L proceedings.

> ter applicable to that proceeding or in accordance with the terms of the notice of hearing.

10 C.F.R. § 51.104(a)(2).

NEPA analyses prepared in connection with NRC licensing proceedings typically consider a wide range of potential accident scenarios. For example, the environmental assessment prepared in connection with the Diablo Canyon ISFSI at issue in this case evaluates the impact of relatively minor accidents such as the loss of external electric power or dropping a fuel storage cask from an elevated position. *Environmental Assessment Related to the Construction and Operation of the Diablo Canyon ISFSI* 19 (Oct. 2003). It also considers the potential impact of more severe events such as "design basis" earthquakes and tornados, and concludes that any radiation release resulting from such foreseeable events would fall within permissible limits. *Id.*; *see also* 10 C.F.R. §§ 20.1001 *et seq.*

D. Considering Possible Environmental Impacts Of An Attack During Licensing Proceedings Would Not Improve Plant Security Or The NRC's NEPA Analysis

In light of the NRC's comprehensive security regulations and rigorous licensing procedures, requiring the agency and its licensees to examine the environmental impacts of a possible terrorist attack would violate NEPA's rule of reason by requiring costly and time-consuming analyses that would not improve security, improve consideration of environmental impacts, or affect licensing decisions.

As detailed in Part III.A, the NRC has developed its security regulations based on sophisticated threat assessments and applies the regulations uniformly to all fixed facilities. The NRC deems any facility that meets the security requirements to be adequately protected from attack. Accordingly, requiring a NEPA analysis of the environmental consequences of a terrorist attack on a given facility during licensing proceedings would not alter the agency's conclusions regarding the adequacy of that facility's security

measures. This becomes even more apparent once one considers the proper scope of NRC licensing proceedings. As explained above, those proceedings give interested parties access to public information about a given licensee's compliance with the NRC's security requirements, and provide them a forum in which to test or challenge that compliance. They do not, however, provide an avenue for parties to debate or propose modifications to the security requirements themselves, which apply uniformly to all fixed facilities. *See* 10 C.F.R. § 2.335 (parties may not challenge NRC rules in licensing proceedings). As a result, the NRC could not use the results of an analysis of environmental impacts of a terrorist attack at a licensee facility to demand site-specific modifications of security requirements for that facility.

Similarly, with respect to concerns about environmental impacts, the NRC's license adjudication process already considers the possible environmental impacts of events at nuclear facilities. Licensees must analyze and mitigate the risk of those impacts, including any that might result from a release of nuclear material or radiation. Adding terrorist attack to the list of possible causes of such a release would not enhance NRC's understanding of the potential environmental impact of granting a given operating license. Nor would it lead to different mitigation efforts, because by complying with the NRC's extensive security requirements the licensee has already taken all the steps the Commission has determined are reasonably required to address the risk of a terrorist attack.

In short, requiring licensees and the NRC to undertake specific NEPA evaluation of the possible environmental effects of a terrorist attack will neither improve analysis nor change results.[7] NEPA does not require the NRC to under-

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[7] Indeed, requiring an environmental analysis of terrorism threats might well *degrade* the NEPA process, much as once happened with former NEPA regulations that required agencies to address "worst case" environmental scenarios whenever the real risk of harm was impossible to ascertain. The Council on Environmental Quality abandoned that ap-

take such pointless efforts. *See Public Citizen*, 541 U.S. at 767-769; *cf. Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 325 (1975) (declining to require agency to evaluate issue under NEPA when it "was already doing so in a more appropriate proceeding"); *Glass Packaging Inst.*, 737 F.2d at 1092 (NEPA did not require Bureau of Alcohol, Tobacco, and Firearms to analyze food-security concerns more properly addressed by Food and Drug Administration).

IV. THE COURT SHOULD GRANT CERTIORARI AND REVERSE BECAUSE THE NINTH CIRCUIT'S DECISION WILL IMPEDE NUCLEAR LICENSING AT A CRITICAL TIME

While the Ninth Circuit's decision will not enhance the NRC's decisionmaking or the public's ability to participate in those proceedings, it will increase the time and expense involved in licensing a wide array of nuclear facilities.[8] That prospect is not hypothetical. In the short time since the court of appeals issued its opinion, the court's analysis has already been applied in other cases and agency decisions, and invoked in a number of additional proceedings where private parties have requested consideration of terrorism risks under NEPA. For example:

- In evaluating a proposed lease of land for an ISFSI at an Indian reservation, the Bureau of Indian Affairs recently claimed that "uncertainty surrounding [NEPA analysis of sabotage] highlighted by the *San Luis Obispo* deci-

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proach when it recognized that requiring "worst case" analysis led agencies to devote "substantial time and resources" to environmental analyses that did not aid decisionmaking but instead "divert[ed] the EIS process from its intended purpose." National Environmental Policy Act Regulations, 50 Fed. Reg. 32,234, 32,236 (proposed Aug. 9, 1985); *see also* Daniel R. Mandelker, *NEPA Law and Litigation* § 10:22, at 10-52 (2006).

[8] The NRC issues licenses not only for power plants and used fuel storage facilities but also for other nuclear facilities, including those for radioactive waste disposal, e.g., 10 C.F.R. § 61.1 *et seq.*, irradiators used in food preservation and to sterilize medical supplies and equipment, *id.* § 36.13, and university research reactors, *id.* § 50.21. The decision below will make all these proceedings more burdensome.

sion counsels disapproval." *Record of Decision for the Construction and Operation of an ISFSI on the Reservation of the Skull Valley Band of Goshute Indians in Tooele County, Utah* 21 (B.I.A. Sept. 7, 2006).

- Parties have raised as-yet-unadjudicated contentions regarding the environmental impacts of terrorist sabotage during licensing hearings for the Pilgrim Nuclear Power Station in Massachusetts and the Palisades Nuclear Plant in Michigan.
- Opponents have challenged licensing proceedings at the Vermont Yankee Nuclear Power Station, *see Entergy Nuclear Vermont Yankee & Energy Nuclear Operations, Inc.*, LBP-06-20, at 17-30 (NRC Sept. 22, 2006).
- The Nuclear Information and Resource Service, Public Citizen, and Sierra Club have relied on the decision below to attack an EIS prepared for an Early Site Permit for the Grand Gulf Nuclear Station in Mississippi. *See* Request for Admission of Late-Filed Environmental Contention, *In re System Energy Resources Inc.*, No. 52-009-ESP (NRC Oct. 12, 2006).
- In *Tri Valley Cares* v. *Department of Energy*, No. 04-17232, 2006 WL 2971651 (9th Cir. Oct. 16, 2006), the Ninth Circuit rejected an agency's NEPA review of a planned biological weapons laboratory, even though it agreed that the agency had taken a "hard look" at environmental concerns and that its analysis was "fully informed and well-considered." *Id.* at *1 (internal quotations omitted). The court relied solely on the decision below in this case to hold that the agency had to examine whether "the

threat of terrorist activity" necessitated further study. *Id.* at *2.

- On December 11, a coalition of groups opposing Southern Nuclear Operating Company's early site permit application for new reactors at the Plant Vogtle site in Waynesboro, Georgia, filed a petition explicitly requesting the NRC to apply the Ninth Circuit's decision in this case.[9]

Nuclear power facilities are massively expensive and time-consuming to license and to construct. By erecting a new procedural hurdle in the licensing process, the Ninth Circuit's decision threatens to discourage the substantial capital investment necessary to bring such facilities on-line to meet the Nation's energy needs. This is all the more true because NEPA procedural requirements create fertile ground for litigation, which, in turn, would yield even further delay and expense.

Such obstacles place pointless burdens on the nuclear licensing process at a time when there is a significant need for nuclear power facilities. Without a substantial boost in domestic supplies, U.S. energy consumption will increasingly outpace production.[10] Over the next 10 years, the utility industry expects demand to increase by almost 20%, while "committed capacity resources" are expected to increase only 6%.[11] The challenge to increase production is compounded by the problems associated with fossil-fuel energy sources. Reliance on imported oil threatens our national se-

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[9] *See* http://www.cleanenergy.org/pdf/VogtlePetition121106.pdf.

[10] *See* National Energy Policy Development Group, *Reliable, Affordable, and Environmentally Sound Energy for America's Future: Report of the National Energy Policy Development Group* viii-ix (May 2001) ("National Energy Policy").

[11] North American Electric Reliability Council, *2006 Long-Term Reliability Assessment: The Reliability of the Bulk Power Systems in North America* 6 (Oct. 2006). "Committed capacity resources" is defined as generating capacity that is "existing, under construction, or planned" and expected to be available. *Id.* at 11.

curity, and tapping domestic fossil-fuel reserves will increase the release of air pollutants such as nitrogen oxides, sulfur dioxide, and mercury, as well as greenhouse gases.[12] Nuclear energy can reduce dependence on foreign oil, without emission of the greenhouse gases and other pollutants associated with fossil fuels.[13] Thus, nuclear power is a crucial component of any long-term strategy to meet the Nation's energy needs in ways that are reliable, affordable, and environmentally sound.

Currently, there are 103 nuclear power plants operating in the United States, providing 20% of the Nation's electricity demands.[14] As these plants continue to operate, they generate used fuel that must be stored in specially-designed facilities like the Diablo Canyon ISFSI. The NRC has already issued licenses for 34 spent fuel storage facilities, including the one at Diablo Canyon. But meeting the Nation's current and future need for nuclear power will require the NRC to license more. NEI expects seven additional fuel storage sites to be added in 2007 alone.

The NRC expects increased licensing activity for nuclear power plants as well. Power plant licenses are normally valid for an initial period not to exceed 40 years, *see* 10 C.F.R. § 50.51(a), and can be renewed for an additional 20 years of operating life, 10 C.F.R. § 54.31(b). Thus far, the NRC has renewed 47 licenses for nuclear power plants, and has pending before it renewal applications for 11 additional plants. NEI members have announced that they will seek at least 24 more renewal licenses for existing plants, and more are expected.[15] Even more importantly, NEI members expect to seek licenses from the NRC for a significant number

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[12] National Energy Policy xiii, 1-6.

[13] *Id.* at xiii, 1-5 to 1-6.

[14] *Id.* at 5-15.

[15] Information concerning power plant license renewals is available on the NRC website at http://www.nrc.gov/reactors/operating/licensing/renewal.html.

of *additional* nuclear power plants in the coming years. Thirteen consortia and companies involving NEI members are preparing 20 applications for as many as 31 new plants. NEI members are also prosecuting four early site permit applications, which are used to "bank" sites for future nuclear power plants.

As even this brief discussion makes clear, the court of appeals' decision will have a broad negative impact at a critical time. Yet, the expense and delay caused by the court's serious misapprehension of NEPA's proper sphere of application will do nothing to enhance agency decision-making, improve public participation in the nuclear licensing process, or protect the environment. The Ninth Circuit's decision warrants review and reversal by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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